IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 20420/2022

In the matter between:

MONTLE AND NEO TRANSPORT SERVICES	First applicant
MONTLE GERALD SELEPE	Second applicant

and

ENGEN PETROLEUM LIMITED	First respondent
THE ACTION ENTERPRISE AND SUPPLIER DEVELOPMENT GROUP	Second respondent

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JUDGMENT DELIVERED ON 18 AUGUST 2023
(delivered electronically via email)

VAN ZYL AJ:

Introduction

1. The applicants, in their notice of motion, seek wide-ranging relief against the respondents.

2. Against the first respondent the applicants seek, amongst ancillary relief:

   2.1 an "upliftment" of the suspension of a distribution agreement concluded between the parties in 2015;

2.2 an order that the distribution agreement be reinstated;

2.3 an order that would place the applicants in the same position that they would have been prior to the suspension of the distribution agreement;

2.4 compensation to the applicants for loss of profit and income, and

2.5 an order that the first respondent be directed to make a complete record available of the state of the first respondent's investigation into the applicants' activities while the distribution agreement was still operative.

3. Against the second respondent the applicants seek an order, pending the finalisation of the present matter, staying an application brought by the second respondent in the Gauteng Local Division of the High Court. In that application the second respondent seeks, *inter alia*, a monetary judgment against the first applicant, as well as orders perfecting a special and general notarial bond, all arising from a loan agreement concluded between the applicants and the second respondent in 2018.

4. Both respondents have opposed the relief sought against them.

5. The applicants seek final relief on motion. The rule in *Plascon Evans*[1] therefore applies. Where there are disputes of fact, the version of the respondents prevails. This is subject only to the qualification that their version will not be accepted if it contains "*bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*".

6. This qualification does not, in my view, apply to the respondents' respective versions in the present matter.

7. Apart from the other avenues that a Court may follow in the exercise of its discretion

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

should there be material disputes of fact on the papers, the Court may dismiss an application if the disputes disclosed by the papers should have been anticipated by the applicants.[2]

8. Also relevant for present purposes is the approach that application proceedings are generally inappropriate for the resolution of matters where fraud is alleged, as it is undesirable to resolve, on paper, disputed issues which largely depend on considerations not only of probability, but also of credibility.[3]

9. I consider the merits of the application in this context.

Background

10. On 25 January 2015 the first applicant and the first respondent entered into a distribution agreement. The distribution agreement essentially provided for the first applicant to transport and deliver, by road, the first respondent's petroleum products, "*as and when requested*" by the first respondent.

11. Clause 5.2 of the agreement provides as follows: "*Notwithstanding anything to the contrary contained in this agreement, Engen may at any time terminate this agreement on ninety days written notice to the Contractor*".[4]

12. The agreement also contains a breach clause. Clause 22 provides for instances in which the first respondent may cancel the agreement as a result of the breach by the first applicant of its obligations under the agreement. It is, for the purposes of determination of the dispute between the parties, not necessary to set out the provisions of clause 22, save to note that clause 22.1 makes it plain that nothing in the agreement or in the rest of clause 22 would limit or derogate from the first respondent's rights to cancel the agreement either in terms of the common law or in accordance with other remedies.

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2 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.
3 *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at paras [19]-[20].
4 The first applicant is referred to in the distribution agreement as the "*Contractor*".

13. On 10 August 2021 one of the first applicant's trucks rolled, with the resultant loss of product belonging to the first respondent. This is referred to in the papers as the "*truck roll-over incident*". On 17 August 2021 the first respondent informed the first applicant that it was suspending the operation of the distribution agreement pending an investigation into the incident. The suspension was lawfully done because the first respondent was, on the express terms of the agreement, under no obligation to place a minimum number of orders with the first applicant at any given time.

14. On 20 October 2021 the first respondent gave 90 days' written notice to the first applicant of the termination of the agreement: "*In terms of clause 5.2 of the Agreement, we hereby exercise our right to, and hereby, terminate the Agreement on ninety days' notice to your client"*. The legal effect of the termination letter was that by 31 January 2022 the agreement had automatically been terminated.

15. The termination of the agreement is the main bone of contention between the parties.

The relief sought against the second respondent

16. On the day of the hearing, at the outset of his argument, the applicants' counsel indicated that the applicants no longer pursued their claim against the second respondent.

17. This was a wise decision because this Court clearly has no jurisdiction to interfere with the pending proceedings in Johannesburg, and with the inherent jurisdiction of that Court to regulate its own process. The applicants should have brought their application to stay in that court (they have, in fact, applied for a stay in their answering affidavit delivered in the Johannesburg Court). The applicants have not made any allegations to support a case that this Court has, in the particular circumstances of this matter, jurisdiction over the second respondent in terms of section 21 of the Superior Courts Act 10 of 2013, or the power to interfere with pending proceedings which were set down for hearing in another division.

18. The second respondent set out in its heads of argument delivered in anticipation of the hearing in this Court that the applicants had, in any event, not satisfied the

requirements for the stay of the Johannesburg application. Given the applicants' stance I no longer have to consider this argument.

19. I shall return to the applicants' interactions with the second respondent in relation to the issue of costs.

The relief sought against the first respondent

20. I have referred above to the nature of the applicants' claims against the first respondent. The relief sought as regards the permanent reinstatement of the distribution agreement is pivotal because, if such an order is not granted, there is no basis for the grant of the remaining relief sought against the first respondent.

The termination of the agreement

21. It is common cause that the first respondent gave the applicants 90 days' written notice of termination on 20 October 2021 in terms of clause 5.2 of the agreement. The permanent reinstatement of the agreement would thus require this Court to find such termination to have been legally invalid.

22. The applicants' founding papers are largely devoted to an attack on the suspension of the agreement when it was still in existence (following the truck roll-over incident in August 2021). As regards the subsequent termination in January 2022, the applicants speculate that there were two grounds on which the first respondent terminated the agreement, namely the truck roll-over incident and the first applicant's failure to comply with certain health and safety regulations. The applicants dispute the breach of the agreement in either of those respects, and contend that the grounds for termination of the agreement were thus invalid.

23. The problem facing the applicants is that they fail to distinguish between termination by notice (in terms of clause 5.2 of the agreement) and cancellation due to breach (which is regulated by clause 22 of the agreement). Termination by notice does not require cogent reasons for its validity, but simply that the procedural requirements for such termination were met. In the present case, clause 5.2 of the agreement required

90 days' written notice. There was no other requirement for termination by notice. The first respondent's motive for termination is therefore irrelevant. The termination notice did not refer either to the truck roll-over incident or to health and safety requirements. It referred simply to the provisions of clause 5.2 of the agreement.

24. In *Bredenkamp and others v Standard Bank of South Africa Ltd*[5] the bank suspended the appellants' credit facilities and thereafter closed their accounts. The Supreme Court of Appeal held as follows as regards the bank's reasons for doing so:

"*[6] The bank sought to justify its right to terminate its relationship with the appellants on two grounds. The first was that it had the right in terms of an express term of its contracts to close the accounts with reasonable notice. It also relied on an implied term with the same effect, namely that an indefinite contractual relationship may be terminated with reasonable notice. …*

[7] The bank did not initially inform the appellants of its reasons for termination. One would assume that in the ordinary course of events the motive of a party in exercising a right - contractual in this case - is irrelevant. (A possible exception could be the abuse of rights.)

…

[24] The appellants … accepted that the agreement with the bank entitled either party to terminate the relationship on reasonable notice for any reason and that this clause or the implied term did not offend any constitutional value. It was accordingly valid. They also accepted that due notice had been given and that a reasonable time had been allowed." [Emphasis added.]

25. In *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd*[6] the Supreme Court of Appeal considered lease agreements which contained either an express or an implied term providing for termination by notice. The landlord had terminated the leases by notice because it wanted to conclude new leases at an increased rental with new tenants. The existing tenants argued that each of their leases contained a tacit term which forbade the use of the termination clause for that purpose. In

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5 2010 (4) SA 468 (SCA).

6 2011 (5) SA 19 (SCA). A subsequent appeal to the Constitutional Court was dismissed (2012 (3) SA 531 (CC)).

applying the bystander test for tacit terms, and rejecting the argument, the Court held as follows:

"*[19] … in my view the question put forward by the appellants as the one that the officious bystander would ask, is wrongly formulated. In consequence, the answer to the officious bystander is likely to be wrong. The question is not whether the landlord may circumvent the rental escalation provisions by means of the termination clause. What the officious bystander would ask is whether either party would be entitled to terminate the agreement, after the initial fixed period and in accordance with the termination clause, in order to negotiate a new lease with different contractual terms. As I see it the answer would then be — why not?*

[20] As formulated by the appellants, the question posed by the officious bystander would introduce the consideration of motive in the exercise of a contractual right, while that consideration is generally irrelevant (see eg Bredenkamp and Others v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA) para 7)….." [Emphasis added.]

26. As the motive for termination is not legally relevant, the terminating party (in the present case, the first respondent) is not under an obligation to provide reasons to the other party, or an explanation as to the motives giving rise to the termination. The terminating party may validly terminate for commercial, non-legal or subjective reasons, including its own perceptions of the other party or the state of their working relationship, whether those perceptions are right or wrong. The terminating party is entitled to invoke the termination clause, instead of cancellation due to breach, precisely to avoid a legal battle to resolve disputes regarding any such breach.

27. The first respondent's termination letter, which had been preceded by a threat of litigation by the first applicant's attorney as a result of the prior suspension of the agreement, provided no reasons for the termination notice. In its answering affidavit, however, the first respondent indicated to the Court that at the time the termination letter was sent, and from its own commercial perspective, the first respondent had lost confidence in the first applicant and the services that it had been rendering.

28. The effect of what is stated above is that, even if the applicants' speculations are

correct, and the roll-over incident and alleged health and safety breaches had influenced the first respondent's loss of confidence in the first applicant, the applicants' dispute in relation to those issues provides no basis for the invalidation of the termination of the agreement. Accordingly, the following issues detailed in the founding papers are legally irrelevant:

28.1 The first respondent's motive or grounds for the termination of the agreement.

28.2 The first applicant's alleged compliance with all of its obligations under the agreement, whether in relation to the truck roll-over incident or the health and safety aspects, or otherwise. The first respondent denies that the first applicant had complied with its obligations in these respects, but such dispute need not be resolved.

28.3 The provisions of the agreement relating to breach and cancellation (regulated by clause 22), as opposed to termination by notice (regulated by clause 5.2); and

28.4 The first respondent's initial suspension of the agreement, which preceded the termination, and the allegations of fraud and bribery levelled by the applicants against the first respondent's employees in relation to the suspension.

29. The applicants' founding papers contain no factual allegations that sustain the legal conclusion that the first respondent's termination by notice was invalid. There is no allegation, for example, that the notice was not in writing, or that some other requirement for termination by notice had not been met.

<u>The remainder of the relief sought against the first respondent</u>

30. There is thus no basis for this Court to find that the termination of the distribution agreement was invalid. This means that the foundation underpinning the rest of the relief sought against the first respondent falls away.

31. There are, in any event, various problematic aspects as regards the remainder of the relief sought. For example, the suspension of the agreement cannot be "uplifted" because such suspension has long been overtaken by the termination of the agreement.

32. The "*reinstatement*" of the agreement is not possible because its termination was not invalid, as set out above. For this reason, too, the Court cannot place the applicants "*in the same position as they previously were*", with "*consistent weekly orders and agreed areas with the first respondent*".

33. This Court cannot on these papers grant the relief sought in relation to compensation for loss of profit and income. This appears to be relief aimed at a declarator in relation to unspecified and unquantified delictual damages. No case is made out for such relief in the founding papers.

34. The applicants did deliver, on the day before the hearing of the application, a supplementary affidavit to which was attached an unconfirmed and unexplained report entitled "*Factual Findings Report of the Independent External Accounting Professional of SNC Financial (Pty) Ltd with respect to the estimated financial losses of Montle and Neo Transport Services CC*".

35. The report constitutes inadmissible hearsay and does not assist the applicants in proving a damages case on papers. The respondents did not agree to the delivery of the supplementary affidavit, and the Court postponing the matter on 6 December 2022 (when it was originally brought as an urgent application) made no allowance for the delivery of supplementary affidavits. No formal application was brought for leave to admit the supplementary affidavit into the record.[7]

36. I am not prepared to accept the supplementary affidavit and the report as part of the evidence to consider in the determination of this application.

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[7] It was simply placed in the court file: see *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at paras [13]-[14].

37. The applicants' claim that the first respondent should "*make available to them the complete record of decision and the status of their investigations in respect of the applicants' complaint lodged*" is irrelevant to the question of the validity of the termination of the agreement. No case is in any event made out in the founding papers for the grant of such relief.

The new argument raised

38. In their heads of argument – delivered shortly before the hearing of the application, outside of the agreed timetable - the applicants raised a new contention, namely that the implementation and enforcement of clause 5.2 of the agreement is contrary to public policy. The applicants contend, in particular, that "*the manner in which Engen exercised the cancellation clause was unreasonable, arbitrary, capricious and unconscionable under the circumstances*".

39. They request – in the heads of argument – that the Court "*refuse to give effect to the cancellation clause, declare the purported termination of the written agreement invalid (on the basis that Engen implemented the clause in a manner that is against public policy) and reinstate the written agreement*."

40. This new contention is, in fact, the sole issue to which the heads of argument are devoted, and the applicants' counsel's oral argument was limited thereto.

41. The difficulty with this contention is that it was never pleaded, or even foreshadowed, in any of the affidavits filed of record. In *South African Police Service v Solidarity on behalf of Barnard*[8] the Constitutional Court held as follows: "*It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by s 34 of the Constitution*". [Emphasis added.]

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[8] 2014 (6) SA 123 (CC) at para [202].

42. The principle applies equally to motion proceedings:[9]

"*[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.*" [Emphasis added.]

43. A party is thus not entitled to introduce, through heads of argument, matter that is required to have been pleaded:[10]

"*[22] … The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought….*" [Emphasis added.]

44. This principle applies to a party attacking a contractual provision, or its enforcement, on the grounds of public policy, as the applicants seek to do via their heads of argument. Such attack must be pleaded. In *Aetiology Today CC v Van Aswegen*

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9 See *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA) at para [13].

10 *Prince v President, Cape Law Society and others* 2001 (2) SA 388 (CC) at para [22].

and another[11] the Court remarked:

"*The … respondents bore the onus of both alleging and showing that public policy demanded that the restraint in their contracts should not be enforced. The question whether such a covenant is contrary to public policy is a factual issue …: As was said by Coetzee J in Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984 (2) SA 261 (W) at 269-70, in application proceedings the affidavits constitute both pleadings and evidence. Not only was the question of public policy not pleaded, in the sense that it was not raised in the answering affidavits, but there is a paucity of evidence…."* [Emphasis added.]

45. In *Bredenkamp supra*[12] the Supreme Court of Appeal stated that it "*is evident from the judgment [Barkhuizen v Napier 2007 (5) SA 323 (CC)] that if evidence is required to determine whether a contract is in conflict with public policy or whether its enforcement would be so, the party who attacks the clause at either stage must establish the facts….*"

46. In *Caratco v Independent Advisory (Pty) Ltd*[13] the Supreme Court of Appeal held:

"[25] …it contended that because business rescue practitioners have a duty of impartiality and independence towards the company under business rescue, the agreement for payment of a success fee with a single creditor, without seeking the approval of the general body of creditors, offended this duty. This is so, it is contended, because the creditor with whom the agreement is concluded would be 'captured' by the business rescue practitioner and secure its own interests outside of the general body of creditors. This implied that there was some sort of bribery or collusive behaviour between the practitioner and the creditor.
[26] These submissions were not only extraordinary but utterly without any merit. It is trite that it is for the party seeking to impugn an agreement on public-policy grounds to plead and prove the facts upon which it is founded. Caratco has done neither. Even worse, the proven facts are against it." [Emphasis added.]

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11 1992 (1) SA 807 (W) at 824B-C.
12 At para [49].
13 2020 (5) SA 35 (SCA) at paras [25] and [26].

47. *Beadica 213 CC v Trustees, Oregon Trust*[14] confirmed the principle as follows: "*…The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to 'demonstrate why its enforcement would be unfair and unreasonable in the given circumstances' ...*" [Emphasis added.]

48. The applicants contend that what differentiates *Beadica* from the present matter is that the applicants in *Beadica* failed to comply with a contractual term and then argued that the enforcement of the strict terms of the contract in question would be contrary to public policy. In the present matter, so the argument goes, the applicants' attitude is that clause 5.2 of the distribution agreement is not inherently contrary to public policy, but that the first respondent had implemented such clause in a manner that is against public policy.

49. I fail to see how this differentiation assists the applicants in overcoming their failure to have pleaded any case involving public policy at all, whether in relation to clause 5.2 as it stands or in relation to the manner of its implementation. It is clear from the authorities that the applicants, who now complain about the enforcement of clause 5.2, should have pleaded their case in this respect in the affidavits filed of record.

50. The applicants' pleaded case as regards clause 5.2 of the distribution agreement is limited to the following two paragraphs in the founding affidavit:

> "*36. According to Annexure 'FA7', [Engen invokes] clause 5.2 of the Distribution Agreement, 'whereby they exercise our right to, and hereby terminate the Distribution Agreement'."*
>
> "*65. [Engen's] termination on the basis of HSEQ and the termination of the Distribution Agreement are invalid, unlawful, misguided, and ill-advised and constitute a repudiation of the Distribution Agreement.*"

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14 2020 (5) SA 247 (CC) at para [37].

51. This is amplified in the replying affidavit:

> "*84. Clause 5.2 of the Distribution Agreement does not provide for termination without considering other provisions of the Distribution Agreement nor does it provide for notice of termination without any reason.*"

52. In paragraph 86 of the replying affidavit the applicants allege that the "*other provisions*" referred to include clause 22.5 of the agreement, which governs cancellation for breach. I pause to point out that, on a proper interpretation of the agreement, with particular reference to the provisions of clauses 5.2 and 22, this allegation is incorrect.[15]

53. Be that as it may, the applicants' case is essentially (as eventually pleaded in reply) that on their interpretation of clause 5.2, the first respondent had not complied with the requirements of the clause. There is, however, no suggestion in the applicants' papers of the enforcement of the clause, or the first respondent's implementation of it, being contrary to public policy.

54. I agree with the first respondent that its objection to the belated introduction of this new argument is not merely technical. It clearly prejudices the first respondent. Had the applicants pleaded the public policy issue in their founding (or even replying) papers, the first respondent could (and would, no doubt) have focused in answering or in supplementary affidavits[16] on countervailing facts and allegations relating to public policy considerations. These considerations could include, for example, the nature of the Convoy Fund (a fund established by the first respondent to support transformation in the supply chain environment) and the applicants' reliance thereon, the circumstances surrounding the conclusion of the distribution agreement, the relevance of the loan agreement with the second respondent, the nature of the relationship (or lack thereof) between the first respondent and the second

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15 I have referred to these clauses earlier in this judgment. See also the discussion in *Maphango supra.* in relation to tacit terms.

16 In dealing with new issues raised in reply: see *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232 (T) at para [51].

respondent, the nature of and manner in which the first applicant rendered its services to the first respondent and to others, the first applicant's alleged failures to comply with its obligations under the agreement and under the relevant health and safety regulations (these are briefly mentioned in the answering affidavit but in a different context), as well as other factors that informed the decision to terminate the agreement.

55. As the first respondent points out, serious factual disputes would no doubt have arisen in relation to some of these issues, and the litigation may have had to take a quite different course than it did.

56. The first respondent points out, moreover, that the applicants rely in their heads of argument on allegations that do not in appear in any of the affidavits delivered on their behalf. These allegations include, for example, that the Convoy Fund manager was appointed by the second respondent and that the first applicant was a beneficiary of the Fund; that the first applicant had acquired status as a qualifying small business ("ESD SMME") or that it was on account thereof that the distribution agreement was concluded in the first place; that the loan agreement with the second respondent was concluded on the strength of the distribution agreement, and that the loan agreement with the second respondent was intended to assist the first applicant with the purchase of assets to fulfil its obligations in terms of the distribution agreement.

57. In summary: the applicants have failed to plead a public policy case and have ambushed the respondents (in particular, the first respondent) with their new approach in the heads of argument delivered shortly before the hearing. They have in any event not made sufficient allegations in their founding papers to sustain such a case. In the circumstances, I refrain from determining the dispute between the parties on the basis of the applicants' public policy complaint.

The striking out application

58. The first respondent delivered an application in terms of Rule 6(15) to strike out portions of the applicants' founding and replying affidavits containing, so the first respondent submits, scandalous, vexatious or irrelevant allegations.

59. I have considered the impugned allegations. They consist mainly of accusations of bribery from within the first respondent's organisation, and the first respondent's attempts to protect its "*corrupt*" employees; they also accuse the first respondent of (amongst other forms of deplorable conduct) bullying the applicants, "*intentionally sabotaging*" their business, and "*ganging up*" against them by suspending and later terminating the distribution agreement.

60. In terms of Rule 6(15), a Court may "*on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted*".

61. Two requirements must be satisfied before an application to strike out matter from an affidavit can succeed. First, the matter sought to be struck out must be scandalous, vexatious or irrelevant. I have no doubt that the allegations in question fulfil this requirement. Second, the Court must be satisfied that if such matter is not struck out the first respondent would be prejudiced.[17] It has been held that scandalous or irrelevant matter may be defamatory of the party seeking the striking-out relief, in which case the retention of such matter will be prejudicial to such party.[18]

62. The allegations in question in the applicants' affidavits are not only irrelevant to the (pleaded) dispute between the parties, but are clearly defamatory of the first respondent, apart from being scandalous and vexatious. For this reason I am of the view that the first respondent's application to strike out should succeed.

Conclusion

63. For all of the reasons set out above, I am not persuaded that the applicants have made out a case for the relief that they seek on the papers.

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17 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733B.

18 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566J-567B.

Costs

64. There is no reason to depart from the general rule as to costs in the present matter. The successful respondents are entitled to their costs.

65. As far as the second respondent is concerned, such costs will include the costs incurred on 30 May 2023, as the applicants only indicated during argument on that day that they were not persisting with the relief sought against the second respondent. They had not alerted the second respondent of their intentions, and the fact that their heads of argument were delivered substantially out of time did not assist. Those heads, in any event, did not indicate that the relief against the second respondent was not being persisted with. The second respondent's counsel and attorney were present in court on the day of the hearing, and the costs of preparation as well as ancillary costs had been incurred.

66. The costs of the postponement of the application on 6 December 2022 stood over for later determination. On that day the application, which had initially been brought on an urgent basis, was postponed for hearing on a later date expressly on the basis that it was not urgent. Given the conduct of the applicants in launching the application on an urgent basis despite the clear lack of urgency, thus causing wasted costs to be incurred as a result of the postponement, I am of the view that the costs of 6 December 2022 should also be borne by them.[19] I deal with this aspect again below, because the second respondent asks that the costs of 6 December 2022 be borne by the applicants' attorney *de bonis propriis*.

67. In *Public Protector v South African Reserve Bank*[20] the Constitutional Court stated as follows in relation to punitive costs orders:

"*[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the*

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19 See *Fripp v Gibbon & Co.* 19113 AD 354.
20 2019 (6) SA 253 (CC) at para [223].

conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court."

68. An extended meaning was given to the concept of "vexatious" in *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another*:[21] " … *in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear (In re Alluvial Creek 1929 CPD 532 at 535)*."

69. I am inclined to grant costs on the scale as between attorney and client given the manner in which this application was launched, and the conduct of the applicants and their attorney leading up to the institution of the proceedings. The underlying contract on which the application is premised was suspended in August 2021, and cancelled in January 2022. The first respondent had given the applicants 90 days' written notice of its intention to cancel the agreement on 20 October 2021. In fact, the applicants raised the issue of termination and the damages allegedly suffered by them as far back as 27 October 2021, when they wrote to the first respondent that "*our client's agreement has been suspended for a period of over four months from date hereof and its own instructions that it has incurred loss of income for the said period*".

70. The allegations of damages and loss of income raised in the letter of 27 October 2021 are the same grounds that are advanced to support the alleged urgency with which this application was eventually launched.

71. The Johannesburg application, sought to be stayed, was instituted in October 2022. In that application, the applicants belatedly delivered an answering affidavit alleging that the present application had been issued on 14 November 2022, and that the

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[21] 1997 (1) SA 157 (A) at 177D.

application had been served on the respondents. On that basis they sought a stay of the application there. The allegation as regards the institution of the present application was patently untrue. This application was only issued on 1 December 2022 and served on 2 December 2022 – including the same stay relief as sought in the answering affidavit in the Johannesburg application.

72. Why the relief sought in the notice of motion in the matter before me was thought to have any element of urgency as at 1 December 2022 when this application was eventually launched and set down for hearing on 6 December 2022, is inexplicable. The applicants have in any event not complied with the provisions of Rule 6(12).[22] No explanation is provided why the application was not launched immediately after the suspension of the distribution agreement in August 2021, or the termination of the agreement in January 2022, or shortly after 20 October 2022 when the second respondent instituted the Johannesburg application. The applicants were the creators of their own alleged urgency. They acted at their own peril.[23] I agree with the submissions made by the respondents' counsel that the launch of the application as an urgent one was an abuse of process.

73. The applicants had, moreover, realised prior to the launch of the application that they faced problems with urgency. It appears from the papers that they, with the assistance of their attorney, sought to persuade the second respondent's attorney to send fresh letters of demand to assist them in advancing a case on urgency when they eventually launched their application. This is of importance in the question whether an order of costs *de bonis propriis* is appropriate.

74. On 17 October 2022 the second respondent received an email message from the applicants' attorney, which email read as follows:

"*Mr. Selepe Montle [the second applicant] asked us to request from you your latest consolidated letter of demand. We intend to institute an urgent application against*

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22 As to which see, for example, *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* [2011] ZAGPJHC 196 (23 September 2011) at para [6].

23 *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at para [16].

Engen for the suspension of the contract with our client and to satisfy the urgency we request your latest consolidated letter of demand which provides the details of the services and debt and that our client should comply on or by 30 November 2022 failing which you will institute legal action and consider a liquidation application. This will then support our intended urgent application to be heard during the course of November 2022.

We do understand that demands have been made in the past and we even spoke to Mr. Devanth about it but we would appreciate your contemporary letter of demand that would clearly support an urgent application from our side and which at the end is intended to reinstate a contract that will enable a payment of your debt.

You can send the letter directly to Mr. Montle without any mention of us." [Emphasis added.]

75. It is clear from the email that not only did the applicants, through their attorney, request the second respondent to fabricate new letters of demand when demands had already been sent, but that they requested the second respondent to set a new due date (that is, 30 November 2022) for compliance with those demands to assist them with the issue of urgency in the intended application.

76. The second respondent rejected the request. In response, the applicants' attorney wrote as follows on 18 October 2022:

"*I would like to make a small clarification about our client's request. The request that was made was not a malicious request or trying to be funny. Our client has had its contract suspended by Engen for no basis and intends to do an urgent application during the course of November 2022. The intention of the urgent application is to urgently resolve the contract with Engen, have it back to normal functionality and then be able to fulfil its contractual obligations with all its creditors including your client.*

If it is possible and in order with you, the request is that your client's demand of 22 September 2022 be extended to at least the end of November 2022 as a demand for potential legal action so that our client may use it to support all other basis for an

urgent application". [Emphasis added.]

77. The second respondent again refused the request. The applicants' attorney's letters must be understood in the context that the application was launched on the perceived basis – and it was so (mis)represented to the Court – that the application was of extreme urgency and that it had to be dealt with as such. The application was, as indicated, instituted on 1 December 2022 and set down for hearing on 6 December 2022

78. The question arises whether the applicants' attorney is to bear the costs of 6 December 2022 *de bonis propriis* as a result of this conduct. A costs order of this nature, on the scale as between attorney and client, is not unprecedented, but is reserved for special occasions:[24]

"[34] ... Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct … that the obvious policy consideration underlying the court's reluctance, to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner. See Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA) ([1998] 3 All SA 577) at 655I – 656B.

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24 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at paras [34]-[35]. See also *South African Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board, and others* 2009 (1) SA 565 (CC) at para [54].

[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care. … See also Ward v Sulzer 1973 (3) SA 701 (A) at 706G-707H." [Emphasis added.]

79. In *Stainbank v South African Apartheid Museum at Freedom Park*[25] the Constitutional Court held as follows:

"[52] Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner. However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, willfully disruptive or negligent may constitute conduct that may attract an order of costs de bonis propriis.

[53] Punitive costs have been granted when a practitioner instituted proceedings in a haphazard manner; willfully ignored court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous.

[54] The basic rule relating to the court's discretion is as relevant to the award of costs de bonis propriis as it is in other costs awards. Extending from this discretion, it appears the assessment of the gravity of the attorney's conduct is an objective assessment that lies within the discretion of a court making the award.

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25 2011 (10) BCLR 1058 (CC).

…

[56] The conduct of the applicant's attorney justifies an award of costs from his own pocket. This includes: the failure to launch the urgent application expeditiously; the delay in the service of the application papers on the first respondent; the failure to comply with court procedures and rules for moving an urgent application, including failing to index and paginate court papers; and the attempt to enrol the application outside normal court hours without complying with the rules." [Emphasis added.]

80. In the matter of *Ribbon Dancer Investments CC v Moosa*[26] this Court recently discussed the issue as follows:

"[21] One must accept that an attorney is duty bound to advance the interest of his client, even where such a course could cause harm to the opposite party ….

[22] In addition, a de bonis propriis award of costs against a legal representative of a party to the litigation is made in exceptional circumstances and generally where there is a substantial deviation from the standard expected of legal practitioners. Dishonestly, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence, and a lack of care are all examples of conduct that would ordinarily merit a sanction of a personal costs order…

[23] However, as Mogoeng J (as he then was) stated in Motshegoa v Motshegoa and Another (995/98) [2000] ZANWHC 6 (11 May 2000) at p19:

> *"Practitioners must know that there is a line which divides the pursuit of a client's genuine course and an abuse of process which they dare cross at the risk of personally attracting the wrath of the court."*

[24] The court's discretion to grant a cost de bonis propriis award is not only confined to the type of egregious conduct mentioned in paragraph [22] above. The court's discretion to make an award costs de bonis propriis includes cases where special

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26 [2023] ZAWCHC 75 (17 April 2023).

circumstances or considerations justify such an order (see, Rautenbach v Symington 1995 (4) SA 583 (O))….." [Emphasis added.]

81. After argument on the merits of the application I requested the parties to deliver affidavits setting out why I should or should not grant a costs order *de bonis propriis* against the applicants' attorney in relation to the costs of 6 December 2022.

82. In his affidavit the applicant's attorney essentially explains that, prior to his firm coming on record, the applicants were represented by attorneys who were not versed in civil matters. Those attorneys therefore did not appreciate the urgency of the position in which the applicants found themselves and thus, "*through no fault of their own, the applicants' matter took longer than expected to be attended to*".

83. The applicants' attorney took the matter over in October 2022. Upon receiving the mandate, it became apparent to him that a great deal of confusion surrounded the status of the applicants' challenge of the suspension and subsequent termination of the distribution agreement. He had insufficient documentation properly to instruct counsel. The applicants' attorney attempted to obtain correspondence from the applicants' erstwhile attorneys, with no success.

84. He was thus, in order to "*expedite the application against the first respondent*", instructed to send correspondence to the second respondent to request "*a consolidated letter of demand which encapsulated the amount claimed plus interests thereon*".

85. With reference to the first email of 17 October 2022, the applicants' attorney states that he was clearly acting on instructions, and in good faith. He was requesting the contemplated letter of demand for his office's records in order to annex to the application before this Court. He never suggested that the second respondent should act "*with impropriety against its own interests or the interests of the first respondent. The sole purpose of the correspondence was to obtain that which was sent to the applicant's erstwhile attorneys and not available from the applicants directly*".

86. The applicant's attorney states that there was a clear miscommunication between him

and the second respondent's attorney about the document sought. In sending the emails to the second respondent's attorney, he had acted out of "*courtesy and professionalism, as it would be inappropriate to make the serious allegations contained in the founding affidavit without fully appreciating the overall circumstances that gave rise to the claim*".

87. He submits, with reference to *Stainbank supra,* that his conduct does not amount to negligence of such a degree that would warrant a costs order against him. He had made a legitimate request upon the instructions of his clients. (He does not address the other instances, apart from negligence, in which a costs order could be made against him.)

88. The problem with the explanation provided is that it is clear from the content of the emails that the applicants' attorney was aware of the fact that letters of demand had previously been sent. He did not simply request that those letters be furnished to him. He asked for a new letter of demand, with a new due date for compliance, expressly so as to be able to make out a case for urgency in the contemplated application against the first respondent.

89. The second respondent's attorney did provide the applicants' attorney with the existing letters of demand in response to the email of 17 October 2022, together with a refusal to create a new letter of demand. There would thus have been no need for the applicants' attorney's follow-up email on 18 October 2022 if his intention was merely to request copies of the letters of demand previously sent and to attach those to the founding affidavit. The applicants ultimately did not attach the existing letters of demand to their founding papers, for reasons that are obvious in the circumstances.

90. The applicants' attorney's explanation conflicts, too, with the applicants' version in their replying affidavit. Had the applicants' attorney's version been correct, it would have been the simple response in the applicants' replying affidavit in answer to the second respondent's allegations regarding the email messages. Instead, what is set out in the replying affidavit is the following:

"151. The second respondent maliciously accuses my attorney on record of

requesting the second respondent's attorneys of fabricating letters of demand. This allegation is unfounded and incorrect. Upon my instructions to my current attorney on record, he addressed an email to the second respondent.

152. I specifically requested that my current attorney on record does so, because I genuinely thought and I was under the impression that the first and second respondent did not have a close relationship. However, I later learnt that the second respondent was closely linked to the first respondent.

153. Initially, I had spoken to someone from the office of the second respondent whom I knew that will assist with a letter of demand and had promised to help me in launching this urgent application, which will support the applicants' urgency.

154. However, it later transpired that no one from the office of the second respondent could assist and that the second respondent was in fact closely linked to the first respondent."

91. Despite the second respondent's attorney forewarning the applicants' attorney and the applicants that the impugned emails would be placed before the Court at the hearing of this application on 6 December 2022, they proceeded to set the matter down for hearing, knowing that it was not urgent.

92. The applicants' attorney is a legal practitioner and an officer of this Court. As such, he has a duty to respect his colleagues and the Court, and is obliged to assist in the administration of justice or, at the very least, not hinder it. The manner in which he proceeded with the application on an urgent basis (albeit on his clients' instructions), his prior conduct in attempting to fashion a basis for urgency, and his subsequent explanation that is frankly less than satisfactory, hampered the administration of justice, illustrate a lack of respect for his colleagues, and display a measure of disrespect for this Court. In all of the circumstances, I am of the view that a costs order *de bonis propriis* on the scale as between attorney and client as regards the hearing on 6 December 2022 is justified.

Order

93. In the premises, I make the following order:

93.1 **The following portions of the applicants' affidavits are struck out on the bases that they are scandalous, vexatious, irrelevant and defamatory of the first respondent:**

93.1.1 **In the founding affidavit: paragraphs 45, 49, 55 and 56.**

93.1.2 **In the replying affidavit: paragraph 23 (the phrase "*then takes us to bribe solicited from the applicants in order to not suspend or terminate or re-instate the Distribution Agreement*"); paragraphs 24, 25, 26, and 27; the final sentence of paragraph 56; the final sentence of paragraph 62; paragraphs 65, 77, 79, 80, and 81.**

93.2 **The applicants shall pay the costs of the application to strike out jointly and severally, the one paying, the other to be absolved.**

93.3 **The applicants' application is dismissed.**

93.4 **The applicants shall pay the costs of the application jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client, subject to what is stated in paragraph 93.5 below.**

93.5 **The costs incurred as a result of the set-down and hearing of the application on an urgent basis on 6 December 2022 shall be paid by the applicants' attorney of record *de bonis propriis* on the scale as between attorney and client.**

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P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicants:

Mr N. S. H. Ali, instructed by Mfusi & Co. Attorneys

For the first respondent:

Mr H. du Toit, instructed by BBP Law

For the second respondent:

Mr M. van Staden, instructed by Webber Wentzel Attorneys