

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/02/2015

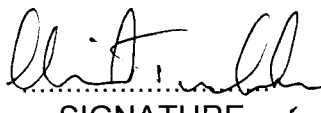
CASE NO: 20239/13

In the matter between:

TOURVEST HOLDINGS (PTY) LIMITED

Plaintiff

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	11/02/15..... DATE	 SIGNATURE

SOLOMON JOHANNES HENNING

Defendant

JUDGMENT

Tuchten J:

1 The plaintiff sues the defendant for damages in delict. The defendant is a practising attorney. I shall refer to him as Mr Henning. In summary, the relevant allegations made by the plaintiff in its particulars of claim are the following:

1.1 On 16 July 2009, the plaintiff mistakenly paid R754 740 into the bank account of Tulah Trading (Pty) Limited (Tulah) held at the Standard Bank.

- 1.2 On two occasions¹ during 2009, the plaintiff sent letters to Mr Henning in his capacity as attorney for Tulah and/or Pascal Monkam jnr² stating that the payment had been made in error, that Tulah was not entitled to these funds and that if Tulah did not repay the money, the plaintiff would institute action for the recovery of the amount.
- 1.3 Mr Henning said that he would take instructions from Tulah and/or Monkam and revert to the plaintiff.
- 1.4 Mr Henning did not revert to the plaintiff. Instead, he took out a writ on behalf of Monkam and caused the amount of R592 641,49 standing to the credit of Tulah at the Standard Bank to be attached and paid over ultimately to Monkam.
- 1.5 Mr Henning did not tell the plaintiff of the attachment of the funds and the payment to Monkam.
- 1.6 Mr Henning knew that the attachment and payment to Monkam would frustrate any attempt by the plaintiff to recover the amount from Tulah.

¹ In fact there were three letters in all.

² The father of Pascal Monkam jnr is Pascal Monkam snr. I shall refer to Monkam jnr merely as Monkam and to his father as Mr Monkam snr.

- 1.7 Mr Henning's conduct was unlawful in that he "acted in constructive contempt of Court in that [such conduct] was designed and executed in a manner to effectively frustrate any attempt by the Plaintiff to recover the amount erroneously paid to Tulah".
- 1.8 Tulah was not able to repay the amount erroneously paid and the plaintiff, unable to recover the amount from Tulah, has suffered damages in the sum attached and paid to Monkam, ie R593 641,49.
- 2 The case I have summarised is the case that the plaintiff sought to prove. The plaintiff bore the onus on all the issues raised by the plaintiff in its particulars of claim. The plaintiff also alleged in its particulars that the money paid into Tulah's account at the instance of the plaintiff was *res litigiosa*, which it was not. As the plaintiff did not persist in this allegation, I need not deal with it.
- 3 Mr Henning raised certain following defences in his plea. Firstly, prescription, on the basis that the plaintiff's cause of action arose more than three years before the summons was served, which is correct. The plaintiff's answer to this, pleaded in the particulars of

claim, was that it only became aware of the Mr Henning's conduct on or about 13 May 2012. Section 12(d) of the Prescription Act provides:

A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

- 4 The onus in relation to the prescription defence rests on Mr Henning. The uncontradicted evidence on behalf of the plaintiff shows that the plaintiff indeed did not know of the actions of Mr Henning until 2012. The plaintiff served its summons in this action on Mr Henning in 2013. The prescription plea was not argued by counsel for Mr Henning and there was no suggestion in the evidence or argument that the plaintiff had the necessary knowledge before 2012 or could have acquired the necessary knowledge by exercising reasonable care. The plea of prescription is dismissed.
- 5 On the merits of the claim, Mr Henning admitted in his plea having received the two letters pleaded, dated 7 September and 13 November 2009 respectively. He specifically denied ever acting as attorney for Tulah. He asserted that he

acted by virtue of a normal relationship from his client; ... just carried out his mandate from his client; ... [and] acted in good faith at all times.

Mr Henning asserted that he had no knowledge whether Tulah had any rightful claim to the amount deposited. He denied that the writ or the attachment frustrated any attempt by the plaintiff to recover the money from Tulah, that he was in constructive contempt of court or that his actions were unlawful. He denied further that the plaintiff only found out what the defendant had done on 13 May 2012. He denied that his conduct had caused the plaintiff to suffer any damages.

- 6 The background to the present dispute, probably entirely unknown to the plaintiff during 2009, was that Monkam and Mr Monkam snr were engaged in a protracted commercial dispute. There were numerous applications to court, orders of court made and varied and appeals noted. In addition, there was an arbitration before Van den Heever SC of the Pretoria Bar (the arbitrator) which resulted in several awards. There was a suggestion in evidence that one of the awards is the subject of a pending review. I told counsel during the course of the trial that I would not act on the say so of any witness in relation to any of these proceedings and that I required the court documents before I found that any such proceeding had taken place and what its outcome was. The proceedings to which I refer in the course of this

judgment are those in respect of which adequate proof has been provided.

- 7 The final award of the arbitrator is dated 11 March 2009. I summarise the relevant background facts as they appear from the final award. On 16 August 2007, Rabie J ordered in this court that the Pretoria Bar Council appoint an arbitrator to determine the dispute between Mr Monkam snr and Monkam in respect of the directorship and ownership in five named companies, ie Hoopstraat Beleggings (Pty) Ltd (Hoopstraat), Tulah, Madeleine Properties (Pty) Limited (Madeleine), Monkam Holdings (Pty) Limited and Monkam Investment Properties (Pty) Limited (in liquidation. Van den Heever SC was duly appointed as arbitrator.
- 8 The then attorney for Monkam sought leave to appeal against the order of Rabie J. Leave was refused, as was a petition to the SCA. Mr Monkam snr delivered a statement of claim in June 2008, claiming certain relief pertaining, inter alia, to the shares and loan accounts in Hoopstraat, Monkam Investment Properties and Madeleine and asking that the appointment of Monkam as a director in these companies be set aside.

- 9 In his statement of defence, Monkam pleaded that he had bought the entire shareholdings in Hoopstraat and Monkam Investments and that the entire shareholding in Madeleine had been donated to him by Mr Monkam snr.
- 10 Monkam went on to allege that he had, pursuant to a mandate from Mr Monkam snr, set up the Fusie Trust, into which Monkam pleaded he transferred the shares in Hoopstraat and Monkam Investments.
- 11 The disclosure that these shares were held by the Fusie Trust prompted Mr Monkam snr to bring an urgent application in this court under case no. 42005/08 for the joinder, in the arbitration, of the trustees of the Trust, one of whom was Monkam himself. Monkam opposed the application for joinder on a legal ground: that arbitration being a matter of agreement, the trustees of the Trust could only be joined with their agreement, which had not been given.
- 12 The application for joinder came before Makgoba J on 25 September 2008. The learned judge rejected the point raised in opposition to the joinder and granted an order for the joinder of the trustees in the Trust.

- 13 At this point, on about 6 October 2008, Monkam's attorneys withdrew and were replaced by a different firm, which came on record as attorneys for all the defendants in the arbitration, ie Monkam and the trustees of the Trust (whom I shall call collectively the arbitration defendants). The new legal representatives for the arbitration defendants asked for a postponement. On 29 October 2008, an interim award was made, postponing the arbitration by agreement to 23 February 2009. This interim award also directed discovery by 14 November 2008.
- 14 The arbitration defendants, however, did not discover as directed. On 8 December 2008, by notice of motion directed to the arbitrator, Mr Monkam snr applied to strike out Monkam's plea and counterclaim for failure to discover.
- 15 On 12 January 2009, a further interim award was made, directing discovery by 23 January 2009 and providing in terms that failure to make discovery would result in the arbitration defendants' plea and counterclaim being struck out. Monkam, in his personal and representative capacities, discovered on 23 January 2009. This prompted a notice in terms of rule 35(3), to which there was no response. Mr Monkam snr then moved to compel compliance with this notice.

- 16 The application to compel compliance with the notice in terms of rule 35(3) led to a further interim award being made by agreement on 18 February 2009: the arbitration defendants were ordered to make further discovery by the next day, failing which the arbitration defendants' plea and counterclaim would be struck out.
- 17 On 23 February 2009, yet another interim award was made: inter alia, the trustees other than Monkam, who had up to then apparently been represented together with Monkam by the same attorneys and counsel were granted the opportunity of engaging their own attorney; the issues relating to Madeleine were to be decided separately from and before all the other issues disclosed in the arbitration pleadings; and Monkam's plea and counterclaim in relation to Madeleine were struck out.
- 18 On 26 February 2009, after evidence was led, the arbitrator made an award directing, inter alia, Monkam to deliver the share certificates in respect of the entire shareholding of Madeleine together with duly completed transfer forms to Mr Monkam snr, declaring Mr Monkam snr the sole beneficiary of all the loan accounts in Madeleine and setting aside the appointment of Monkam as a director of Madeleine. The arbitration was then adjourned to 27 February 2009.

- 19 On 27 February 2009, the present defendant, Mr Henning, appeared at the arbitration on behalf of Monkam and all the other defendants. Monkam himself was also present at the arbitration. The arbitrator recorded that this was the first time that Monkam had himself been physically present at the arbitration. Mr Henning sought a postponement to enable him to prepare. This request led to a further interim award. The arbitration was postponed and Monkam directed to pay certain costs. If those were not paid by 6 March 2009, the defence of the arbitration defendants would be struck out and Mr Monkam snr would be entitled to proceed with the arbitration by default.
- 20 Mr Henning made submissions to the arbitrator in relation to costs and to that extent the award was made against Mr Henning's submissions. On 11 March 2009, Pelser SC appeared at the arbitration on the instructions of Mr Henning. Pelser SC told the arbitrator that the costs order against Monkam had been irregular because Mr Henning had not been representing Monkam in his personal capacity. I may say that this conflicts with what Mr Henning told me in the witness box.
- 21 Pelser SC then asked that the arbitration be adjourned to enable the trustees to challenge the order made by Makgoba J on 25 September 2008. Leave to appeal against this order had been refused by

Makgoba J on 9 February 2009. The trustees had apparently decided to seek leave (out of time) to appeal to the SCA.

- 22 The arbitrator refused the adjournment and proceeded with the arbitration. Monkam had not complied with the award of 18 February 2009 and the arbitrator made an award directing the defendants in the arbitration to deliver the entire shareholdings in Hoopstraat and Monkam Investments to Mr Monkam snr, declared Mr Monkam snr the sole beneficiary of the loan accounts in these two companies and set aside the appointments of Monkam as a director of these two companies.
- 23 I was told in evidence that the SCA had granted leave to appeal against the joinder order but no order to that effect is before me. There is an indication in the documents that Monkam may have brought a review application in relation to one or other of the arbitration awards. There is a document before me which appears to be a draft "notice of review", which it was alleged by the attorney for Mr Monkam snr related to Hoopstraat and Monkam Investment. As I have said, unless the court file, or an agreed set of documents is placed before me, I cannot find that any order as alleged or, indeed, any such case exists. I was also told that there are settlement

discussions pending between Mr Monkam snr and Monkam and that further litigation between those parties is presently in abeyance.

24 Mr Henning said in evidence that he had accepted a mandate to act for Monkam the night before his appearance before the arbitrator on 27 February 2009, having been asked to take Monkam's case by Monkam's previous attorney. Mr Henning met Monkam for the first time on the day he first attended the arbitration.

25 Mr Henning testified that he was invited by counsel for Mr Monkam snr, S Maritz SC, to attend an informal lawyers' meeting at which the various legal representatives took refreshments and chatted about the case in which they were involved. During that meeting, Mr Henning said, S Maritz SC told him that the Monkam family were from the Cameroons and were the richest family in that country; indeed the Ruperts³ of the Cameroons. On the strength of this remark, which Mr Henning said was merely made in passing, Mr Henning said he concluded that all the bank accounts of the companies at issue between Mr Monkam snr and Monkam had large credit balances. These bank accounts, Mr Henning said, included that of Thula.

³ A reference to the South African family of that name, who are reputedly very wealthy.

26 Mr Henning also testified that he at no time took a statement from Monkam or attended a comprehensive consultation at which the history of the dispute and other relevant matters were canvassed. I would find this evidence improbable if Mr Henning were merely acting for Monkam without the assistance of counsel. But in this case, Mr Henning briefed Pelser SC, a reputable silk at the Pretoria bar. It is improbable that counsel attended to his brief in so slapdash a fashion and of course if there were such a consultation, Mr Henning as the instructing attorney would have been present. Mr Henning has at all relevant times conducted a one man practice and was himself responsible for drawing many of Monkam's pleadings and affidavits. Commercial litigation between family members is notoriously complex. On Mr Henning's version, he was not at risk for fees. In these circumstances, I find Mr Henning's unsupported allegation that he had not comprehensively consulted with Monkam shortly after he began to act for Monkam highly improbable.

27 In this context, I do not overlook Mr Henning's unchallenged evidence that he suffered emotional distress during this period when a family member was the victim of violent crime in September 2009. As a result, he said, he neglected his practice for several months.

28 The Pretoria Hotel is owned by Madeleine. Up until the award of 26 February 2009,⁴ all the revenue of the Monkams' revenue generating assets, including the Pretoria Hotel, was received into the bank account of Thula. I shall refer to this as the treasury arrangement. Ms Suisie Monkam, Monkam's sister, is now the sole director of Madeleine. She testified that after the award of 26 February 2009, she opened a new bank account for Madeleine with the Standard Bank and notified all Madeleine's debtors accordingly. The operation of the treasury arrangement thus ceased when Madeleine's new bank account was opened.

29 The plaintiff was one of Madeleine's debtors. The plaintiff arranges tours and reserves accommodation for the tour members in its own name. From at least 7 July 2009 Madeleine gave in its invoices to the plaintiff details of this new account as the account into which Madeleine required the plaintiff to make payments to Madeleine. The amount due by the plaintiff to Madeleine in July 2009 was R754 740. From this it follows that by 7 July 2009, the treasury arrangement had ceased to operate.

4

Pursuant to which the shares and loan accounts in Madeleine were declared by the arbitrator to vest in Mr Monkam snr.

- 30 Mr Yorick Fisch was the employee within the plaintiff responsible for paying Madeleine. Mr Fisch died at a young age and was therefore not available to the plaintiff as a witness. Fisch paid the sum due into Thula's account, as he had done before. The plaintiff's case was that this payment was made in error. There can be no dispute at this level. The payment was clearly made in error. On the probabilities Fisch did not realise that the bank account into which the plaintiff was required to pay what it owed Madeleine had changed.
- 31 In August 2009, Fisch disclosed the error he had made to Ms Folli, the plaintiff's chief financial officer. Ms Folli instructed Fisch to telephone the owner of the Pretoria Hotel. Fisch contacted Monkam. The probability is that Fisch was unaware of the battle between father and son for control of the Monkam assets. At this stage Mr Monkam snr had taken control of Madeleine and its assets pursuant to the arbitration award of 26 February 2009 but Monkam did not disclose this to Fisch. Instead, Monkam referred Fisch to "his attorney", Mr Henning, and supplied Fisch with Mr Henning's cellphone number.
- 32 Fisch had a telephone conversation with Mr Henning on 7 September 2009. He then wrote a letter to Mr Henning on the same date. It reads, under the heading "re: Erroneous deposit - Tulah Trading (Pty) Ltd":

With reference to the above and our telephonic conversation dated 07 September 2009 regarding erroneous deposit of R754 740.00 into the bank account of Tulah Trading (Pty) Ltd dated 16 July 2009. This was for services rendered at Pretoria Hotel to Tourvest Travel Services.

Attached please find all documentation that these monies were meant for Pretoria Hotel (Madeleine Properties (Pty) Ltd and not for the bank account in the name of Tulah Trading. We have attempted with our bank to reverse the funds, but as they could not get in contact with the account holders at the time, we have yet to recover these monies.

We have in the meantime received a letter of demand from the attorneys of Madeleine Properties and hereby urge you to assist us with this matter soonest.

Should further information be required, please contact the undersigned.

33 By summons dated 15 September 2009, taken out in this court under case no. 57864/09, Madeleine sued the plaintiff for the sum in question. The plaintiff conceded the correctness of Madeleine's claim and paid the sum of R754 740 to Madeleine.

34 Ms Sirkissoo is the plaintiff's financial manager and was Fisch's line superior. On 16 October 2009, after finding out about the incorrect payment, she telephoned Mr Henning. She asked Mr Henning what had transpired between him and his client. Mr Henning responded that he had been busy and had not discussed the matter with "his client", but did not say who his client was.

35 On 8 October 2009, Ms Folli telephoned Mr Henning. She asked him what had transpired in relation to the erroneous payment. Ms Folli said that Mr Henning told her that he would take instructions and advise her of the outcome. She then wrote a letter dated 8 October 2009 to Mr Henning. It reads, under the heading "Incorrect payment to Tulah trading (Pty) Ltd":

As per our conversation this morning, I hereby inform you that should we not receive full payment from Tulah Trading, of R775, 583.23, as calculated below, by 15th October 2009, we will be handing this matter over to our attorneys. I wish to advise you that should we go this route, you will also be liable for our attorneys fees.

[Calculation omitted]

We tried to recall the payment via our bankers, ie Nedbank on the 23rd July 2009, but they advised that they were unable to get authorisation from the beneficiary of the account to do this, feedback from Nedbank was received on 11 August 2009. We then contacted Tulah Trading, and spoke to Pascal [ie Monkam] on the 07 of September 2009, he advised that we speak directly to his attorney, and provided us with your details. We contacted you on the same day, and advised you of the matter, in which you replied to send the details to you in writing, and a fax was sent through to your offices on the same day, by Mr Yorick Fisch. Mr Yorick Fisch, called you last week, however you advised him that you had not spoken to your client as yet.

We have already paid the supplier that was due the money, hence we will have no option but to hand this matter over to

our attorneys, should we not receive payment by the 15th of October 2009.

[There follow the plaintiff's banking details]

36 As I have mentioned, Mr Henning denies that he was Tulah's attorney. This may be true in the strictly formal sense that although Monkam was Tulah's sole director, he never actually asked Henning to take any action on behalf of Tulah. From at the latest 26 February 2009, the date upon which the arbitrator awarded control of Madeleine to Mr Monkam snr, Tulah had no business and no significant assets of which Monkam, and therefore Mr Henning, were aware. Its bank statements show that on the date the plaintiff paid the sum in question into Tulah's bank account, Tulah's account was in debit in the sum of at least R3 369,95. Between 16 July 2009, when the money was paid in by the plaintiff, and 26 January 2010, when the balance in the account, then only R593 641,49, was cleaned out of the account at the instance of Mr Henning, acting for Monkam, there are no credit entries. After that date are several credit entries described in the statement as "IB payment from loan" but they were not explained.

37 I must now go back in time. Mr Monkam snr brought an application against Monkam in this court under case no. 11967/07. It seems probable that this application culminated in the order of Rabie J to which I have referred, appointing the arbitrator. On 8 January 2008,

Coetzee J granted an order which provides in relevant part that pending the finalisation of this application, Monkam (on his return from overseas) would act as *co-signatory* on certain bank accounts of Hoopstraat and Tulah with two named persons appointed as independent auditors. The purpose of this provision was declared (I summarise) to be to ensure probity in the operation of the accounts.

- 38 Paragraph 2.11 is of considerable importance in the context of the present case. It provided:

That the Respondent [ie Monkam] is to receive an amount of R50 000,00 to be paid on or before 15th January 2008 and thereafter on or before the same date of every subsequent month, up until finalisation of this application.

- 39 It seems likely, having regard to certain textual aspects of the order, that the quantum of R50 000 was not agreed between the parties but was fixed by Coetzee J after argument. The remaining provisions of the order, with one exception presently not relevant, were agreed between Mr Monkam snr and Monkam. On 25 April 2008, Legodi J was moved for a variation of the order of Coetzee J. Legodi J ordered that a request which must have been made to him for an increase of Monkam's allowance be dismissed, but that the

... entire interim order is hereby confirmed pending the finalisation of the arbitration proceedings.

I shall refer in what follows to paragraph 2.11 of the order of Coetzee J as varied by Legodi J simply as paragraph 2.11.

40 It is common cause that the “arbitration proceedings” referred to in the order of Legodi J are those before Van den Heever SC with which I have dealt above.

41 But although Mr Henning was not, in the sense I have described, the attorney for Thula, it is perfectly clear that Mesdames Sirkissoon and Folli both thought that he was. Mr Henning testified that he had pertinently told all three employees of the plaintiff that he was not acting for Thula. I reject this evidence as deliberately false for several reasons: firstly, if Mr Henning had told any of them so, they would not have written to him asking to take instructions and revert. Secondly, it was never put to either Ms Sirkissoon or to Ms Folli that Mr Henning would so testify.

42 Thirdly, the plaintiff handed the matter over to Mr Mostert, a partner in the plaintiff’s attorneys. On 13 November 2009 he sent a letter of demand to Thula under s 345 of the Companies Act, 61 of 1973 (the old Companies Act) demanding payment of the amount paid to Thula

in error. On the same date Mr Mostert sent a letter to Mr Henning, enclosing a copy of the s 345 demand. The letter to Mr Henning read as follows under the heading “Our client: Tourvest Holdings (Pty) Limited/ Your client: Tulah Trading (Pty) Limited trading as Pretoria Hotel and Self-Catering Suites”:

We understand that you represent Tulah Trading (Pty) Limited. Find enclosed herewith a letter that was addressed to your client, the contents of which is self-explanatory.

It is simply inconceivable that Mr Mostert would have written the letter of 13 November 2009 to Mr Henning unless he had been told that Mr Henning was acting for Thula.

- 43 Fourthly, Mr Henning did not reply to any of these three letters. Even given the his difficult personal circumstances, I do not think he has given any satisfactory explanation for his failure to contradict the impression he and Monkam had given to the authors of the letters. But in my view Mr Henning had a specific motive for keeping the plaintiff and its attorney in the dark about whom he represented. He did not want to precipitate any action by the plaintiff against Tulah because such action would reduce or even destroy Mr Henning’s chances of getting his hands on the money standing to Tulah’s credit in its bank account. The plaintiff had taken no action against Tulah during the

several months after it had discovered the error. Mr Henning probably sensed weakness on the part of the plaintiff and resolved to exploit it. I shall get to this later in more detail.

44 Fifthly, Mr Henning, as he well knew, *could have been* appointed as attorney for Tulah if Monkam had thought it necessary because Monkam was the only director of Tulah. But as I shall show, Monkam, pursuant to a strategy designed by Mr Henning, took action *against* Tulah in breach of Monkam's fiduciary duty as director of Tulah. I have no doubt that if the plaintiff had taken proceedings against Tulah, Monkam would in his capacity as its director have consulted with or appointed Mr Henning to act for Tulah. Indeed, Mr Henning admitted that he *did* ask Monkam whether the payment by the plaintiff had been made in error. With this too I shall deal later.

45 On 14 September 2009, Mr Henning wrote a letter to Mr Monkam snr's attorney. This letter is not before me but the reply, dated 2 October 2009, is. One can work out from the reply what the letter said. Mr Henning's letter was a demand for payment pursuant to paragraph 2.11. It emerges from the reply that payment was demanded from "your client". No person, natural or juristic, was identified in the letter of demand as being "your client". Payment under paragraph 2.11 had been made until February 2009. After that, payment was discontinued.

It will be recalled that the arbitrator had made his final award on 11 March 2009 and that the payments under paragraph 2.11 were due on the 15th of the month.

46 In the letter dated 2 October 2009, Mr Monkam snr's attorney made the point that payment under paragraph 2.11 had to be made "until finalization of the arbitration, which was finalized in March 2009." The point was also made that the order did not fix the attorney's client with liability to pay under clause 2.11.

47 It is unlikely that the demand for payment which came so soon after the letter from Yorick Fisch dated 7 September 2009 was mere coincidence, although Mr Henning says it was. Monkam (and Mr Henning) had not protested the cessation of payments, one of which would have been due four days after the arbitrator's final award. There was no explanation why Monkam had waited six months to claim these substantial sums. I think that the probability is that Monkam identified the money in Thula's account as an easy target. The plaintiff was not actively seeking to protect its rights, indeed it was positively supine, and Mr Monkam snr had no interest in this money because Madeleine had been settled by the plaintiff.

48 It is in this context that Mr Henning says that he asked Monkam whether it were true that the payment by the plaintiff had been made in error. Mr Henning's evidence was that Monkam had told him that the payment was not made in error because of the treasury arrangement mentioned in paragraph 28. But, Mr Henning said (I summarise), he did not ask Monkam whether the treasury arrangement was still in operation when the plaintiff made its payment and had no reason to think that it was not. I find this evidence unworthy of credit. I shall say why I think so below.

49 Mr Henning took no action in relation to Monkam's claim under paragraph 2.11 until 26 November 2009. The delay is not explained but Mr Henning testified that on that day Monkam came personally to his office from Sandton. Mr Henning drew an affidavit in support of a request to the registrar to issue a writ under the court heading of the case in which the order containing paragraph 2.11 had been granted. In the affidavit Monkam said that he was claiming payments of R50 000 per month from 15 March through to 15 December 2009 - even though the amount claimed for December 2009 could on Monkam's version not be due. Furthermore, the amount was claimed from Thula, Hoopstraat and Madeleine.

50 The body of the affidavit, to which the orders of Coetzee J and Legodi J were attached, contained the following:

- 4 In terms of paragraph 2.11 [of the order of Coetzee J], [Thula, Hoopstraat and Madeleine] are to pay me a salary of R50 000.00, the first payment to be made on 15 January 2008 and thereafter on or before the same date of each subsequent month.
- 5 By virtue of [the order of Legodi J], also on this case number, the order [of Coetzee J] was confirmed and the condition “up until finalisation of this application” as referred to in clause 2.11 ... was substituted with the condition “pending the finalisation of the arbitration proceedings.”
- 6 **The arbitration proceedings have as yet not been finalised as there is an appeal to the full bench of this honourable court pending in this regard.⁵** Therefor[e] I am still entitled to monthly payments of R50 000.00 until finalisation of the arbitration proceedings on appeal.
- 7 [Thula, Hoopstraat and Madeleine] made such payments to me but only until 15 February 2009 when the last payment was made to me.
- 8 The payments due on 15 March 2009, 15 April 2009, 15 May 2009, 15 June 2009, 15 July 2009, 15 August 2009, 15 September 2009, 15 October 2009, 15 November 2009 and 15 December 2009 are still outstanding as the said RESPONDENTS failed to make such payments to me.

⁵ My emphasis.

- 9 There is therefor[e] presently 10 payments of R50 000.00 each due and payable to me, thus a total amount of R500 000.00.
- 10 I am therefore entitled thereto that a warrant of execution be issued against [Thula, Hoopstraat and Madeleine].

51 The Registrar acceded to the request for a warrant of execution. The writ of execution, prepared and signed by Mr Henning, directed the sheriff to “attach and take into execution the movable goods” of Thula, Hoopstraat and Madeleine and “of the same to cause to be realised by public auction” the sum of R500 000 together with interest at 15,5% per annum. A schedule was attached to the affidavit in support of the request for a writ showing the dates from which it was contended interest would run on each claim for R50 000..

52 But Mr Henning did not instruct the sheriff to act in accordance with the terms of the writ. Instead he instructed the sheriff to repair to the branch of the Standard Bank housing the account of Thula into which the erroneous payment by the plaintiff had been made. On 26 January 2010 Mr Henning accompanied the sheriff to the Standard Bank to ensure, he said, that the sheriff was not sent from pillar to post.

- 53 It is difficult to understand the reason for the delays between signature of the affidavit, application for the writ and the actual execution of the writ. Mr Henning said that the delays demonstrated the truthfulness of his version that he had simply regarded this as a routine case which was not urgent. There is no evidence to contradict him on this score but I doubt that I have been told the full story. Be that as it may, the money in the Standard Bank account of Thula was not at risk because no funds could be withdrawn from that account without the cooperation of Monkam who was an essential co-signatory on the account.
- 54 On 27 January 2010, without any notice to Thula or anyone else, the Standard Bank paid the sum of R593 641,49 in satisfaction of the writ. It will be noted that the writ called for payment of R500 000 plus interest. Mr Henning said that he did not make an interest calculation but that the additional amount above R500 000 was for interest. The sheriff's return makes no reference to a demand for interest. Furthermore, interest properly calculated was agreed between counsel at R42 290,16. So, taking the writ at face value, there was an overpayment by the bank.
- 55 Counsel for the plaintiff sought to lay the blame for the overpayment at the door of Mr Henning. I do not think that the evidence would justify my doing so. The calculation might have been made by a bank

official or the sheriff. Or perhaps the bank official merely decided to pay over whatever was in the account. Whatever the truth may be in this regard, the amount paid over reduced the funds in the account to a nil balance.

56 The approach to the registrar for a writ was done *ex parte*, on incomplete information, on a factual basis which was incorrect and pursuant to legal submissions which were absurd. No notice was given to any of those whose movables were targeted by the writ. Mr Henning justified this by reference to the practice of this court which has existed for many decades.

57 It is true that a longstanding practice exists under which a party armed with a court order providing for a prospective indebtedness is permitted to approach the registrar *ex parte* for a writ. Maintenance orders are frequently the subject of such requests for writs. Counsel for the plaintiff accepted that there was such a practice but submitted that any such *ex parte* approach must be subject to the same stricture that governs *ex parte* applications to court, ie that, as has been authoritatively stated in *National Director of Public Prosecutions v Basson* 2002 1 SA 419 SCA at para 21:

Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B).

58 Mr Henning admitted (indeed, as an attorney who conducted a litigation practice of many years standing he could hardly do otherwise) that he was aware of this rule. But, Mr Henning said, although he knew that he was not entitled to suppress material facts from a *court*, he believed that there was no such obligation on him in relation to a request to the registrar to *implement* an order of court. He admitted further that if he had disclosed or caused Monkam to disclose to the registrar that the claim was disputed by Mr Monkam snr on behalf of Hoopstraat and Madeleine, that the plaintiff had made a substantial payment into Tulah's account, the proceeds of which Mr Henning intended to attach or that the treasury arrangement (pursuant to which the payments of R50 000 had in the past been made to Monkam) had come to an end, the registrar might well have declined to issue the writ.

59 I do not believe that this seasoned litigation lawyer thought that although he was not entitled to withhold material facts from (ie mislead) a court, he was entitled to mislead the registrar of the court. I reject Mr Henning's evidence to the contrary and find that he withheld the information which Monkam had given him or which he

had acquired through representing Monkam with the intention of deceiving the registrar.

60 On 28 January 2010, Mr Henning received into his trust account from the sheriff the sum of R592 686,45, representing the amount paid to the sheriff by Standard Bank less the sheriff's charges. On 1 February 2010, Mr Henning paid the sum of R563 054,45 to Monkam and transferred the balance, R29 634, to his business account as his fee and collection commission.

61 On 26 February 2010, Mr Henning obtained a further writ from the registrar, upon the same cause of action and with the same nondisclosures. This further writ was obtained on the strength of an affidavit prepared by Mr Henning and sworn by Monkam on 23 February 2010. In addition to the allegations from the earlier affidavit which I have quoted, Monkam alleged that a further two payments of R50 000 each were due to him by Tulah, Hoopstraat and Madeleine. In this further warrant, the sheriff was directed to attach movables to the sum of R100 000 plus interest from the same three alleged debtors, ie Tulah, Hoopstraat and Madeleine. On 26 February 2010, on the strength of this further writ, the sheriff attached the sum of R102 634, 12 in the bank account of Madeleine at the Standard Bank.

62 In this instance, a notice of attachment was served on Madeleine and came to the attention of Ms Suisie Monkam. She immediately notified Mr Monkam snr's attorney, Mr Finck. Finck promptly brought an urgent application to this court under case no 11967/07, the case number

under which the appointment of an arbitrator had been ordered by Rabie J and interim orders granted by Coetzee J and Legodi J which gave rise to and varied paragraph 2.11. Finck made the founding affidavit in the absence of Mr Monkam snr in the Cameroons, so I shall call this application the Finck application. All the papers making up the Finck application are before me and were referred to extensively in the evidence.

- 63 The purpose of the Finck application was to stay and ultimately set aside the further writ dated 26 February 2010. Finck's affidavit asserts that the arbitration had been finalised on 26 February 2009 with the award of that date and that paragraph 2.11 did not stipulate that Thula, Hoopstraat and Madeleine had been ordered to pay anything to Monkam. Finck also pointed out that there was no appeal pending against the final arbitration award.
- 64 Mr Henning testified that he drew Monkam's answering affidavit in the Finck application on the day that this affidavit was sworn, 29 April 2010. In this answering affidavit, Monkam said that there was not only an appeal pending in this court under case no A808/09 (the papers in which are not before me) but that there was a review of the awards of the arbitrator pending. The appeal is in relation to the joinder of the Fusie Trust trustees. The only indication I have before me that review proceedings were instituted is the draft "notice of review" to which I referred. On this basis, Monkam disputed the assertion that the arbitration had been "finalised".

- 65 A court order must be interpreted as any other document. *Firestone South Africa Ltd v Genticuro AG* 1977 4 SA 298 AD 304D. The affidavits in the Finck application show that the purpose of the provision in clause 2.11 was to provide for remuneration for Monkam as director of Tulah, Hoopstraat and Madeleine. The arbitration awards declared Monkam divested of his office as director of Hoopstraat and Madeleine. Tulah had no business and Mr Monkam snr had no further interest in Thula, which seems to have existed merely to facilitate the treasury arrangement, so the purpose of the order in remunerating Monkam for carrying out his duties as director of the relevant companies had disappeared. The literal meaning of “finalisation” in this context means the moment when the arbitrator delivers his final award or the arbitrator otherwise becomes *functus officio*. Mr Henning must have known that if he had presented the registrar in the affidavit with his eccentric reasoning leading to the conclusion that the arbitration was not finalised or if he had disclosed that the pending review did not relate to Madeleine, the registrar would probably not have issued the writ, at least in relation to Madeleine.
- 66 Monkam’s answering affidavit further puts up the argument that *because Mr Monkam snr had denied being liable for the paragraph 2.11 remuneration*, it followed that Tulah, Hoopstraat and Madeleine were so liable. Once again, if this similarly eccentric reasoning had been put up to the registrar in the affidavit, the registrar might well have declined to issue the writ.

67 Historically, the payments under paragraph 2.11 had been made by Tulah. This background fact, taken in context, points to a conclusion that, on a proper interpretation of paragraph 2.11, Tulah and Tulah alone was liable under the order of Coetzee J as varied for payment of these amounts.⁶ This point was made by Finck in his founding affidavit and elicited the following response from Monkam in paragraph 18.1 of his answering affidavit in the Finck application:

I admit that the initial payments to me were made from Tulah Part of the money that was in Tulah from time to time came from the account of [Madeleine]. Initially the money of the whole group went through the account of Tulah That is the only reason why I received the allowance from Tulah **After the arbitration proceedings, Suisie Monkam opened an account in the name of [Madeleine] in order to prevent me to receive any further monies from Tulah** [my emphasis]

68 This passage shows, quite ineluctably, that Monkam knew that the payment by the plaintiff to Tulah had been paid in error because the treasury arrangement had been cancelled. It also shows that Monkam knew that no amounts, or at least no amounts of any significance, had or would ever come into Tulah except amounts due to Madeleine and the other members of the Monkam group.

⁶ But the interpretation issue is complicated by the consideration that the intention to be determined is that of the court, not that of the parties who proposed portions of the order.

- 69 Mr Henning testified that he had been unaware of the facts known to Monkam as put up in paragraph 18.1 of his answering affidavit in the Finck application until 29 April 2010, the day on which Mr Henning said that he had drafted the affidavit.
- 70 Mr Henning said that pursuant to the three letters from the plaintiff and its attorney I have mentioned he, rather casually and in passing, asked Monkam if it were true that the payment had been made to Tulah in error and that Monkam had replied that he payment had not been made in error *because of the treasury arrangement*. Having heard from his client that the payment had not been made in error because of the treasury arrangement, thus Mr Henning, he made no further enquiries and left the issue there.
- 71 I do not believe that this evidence can be true. I have mentioned the improbability that Mr Henning would not comprehensively have consulted with Monkam. The issue of Monkam's paragraph 2.11 remuneration must have been of considerable importance to Monkam. In numbered paragraph 4 of a letter dated 7 April 2010 written by Mr Henning to Finck, Monkam states that the payments not only attached to his position as director "but it was in fact an allowance to enable him to live, which was also the case with many other members of the family". In other words, cutting off the paragraph 2.11 payments meant cutting off Monkam's subsistence allowance.
- 72 It will also be observed that Monkam made no attempt to get to the merits of the arbitration. He used stratagems to delay the process. At

least one of the reasons why he did so was, on the probabilities, that as long as the arbitration was not “finalised”, Monkam received R50 000 a month under paragraph 2.11. This was the proverbial money for jam. Monkam did not have to do anything much for the money except ensure that the arbitration did not come to an end.

73 In these circumstances, the probability is that Monkam would anxiously and urgently have asked Mr Henning to take action to restore the paragraph 2.11 payments. To advise Monkam, once Mr Henning knew that the source of the payments was the treasury arrangement, all Mr Henning needed to know in order to advise Monkam in relation to the paragraph 2.11 payments was whether Monkam knew of any grounds upon which it could be contended that the treasury arrangement had survived the final arbitration award. And once Mr Henning knew that the treasury arrangement was no longer being honoured, whether rightly or wrongly, and Madeleine had instructed its debtors no longer to settle their debts to Madeleine by payment into Tulah’s account, it had to follow that the payment by the plaintiff to Tulah had been made in error.

74 But Mr Henning says that he did not ask this question, ie whether Monkam knew of any grounds upon which it could be contended that the treasury arrangement had survived the final arbitration award. I do not believe him. Any attorney would have asked the question of his client. I find that Mr Henning’s denial that he had been given the instruction embodied in paragraph 18.1 of the answering affidavit in the Finck application is false. I find that he had been given the

instruction early on in his relationship with Monkam. And because Mr Henning knew that the treasury arrangement, rightly or wrongly, had been terminated upon the final arbitration award, he had to know that the treasury arrangement could not justify the payment by the plaintiff to Tulah.

75 And once it is established that Mr Henning knew what is contained in paragraph 18.1 from early on in his relationship with Monkam, it follows inevitably that he drew the affidavits supporting the requests to the registrar to issue the writs I have mentioned knowing that the plaintiff had paid the amount in question to Tulah in error and knowing that the Tulah bank account was highly unlikely to contain any money other than as a result of the erroneous payment. His evidence that he thought that Tulah's bank account was substantially in credit from sources other than the plaintiff's erroneous payment can therefore also not be true.

76 I therefore find that Mr Henning approached the registrar to issue the writs on facts which he knew to be untrue and having decided to suppress relevant facts because he knew that if those facts were disclosed, his strategy to get at the money in Tulah's bank account and otherwise would fail.

77 I was told in evidence that the Finck application succeeded and the further writ, dated 26 February 2010 was set aside. There is however nothing before me to verify this. The first writ, under which the money

in Tulah's bank account was seized, was never attacked and its validity was not challenged before me.

78 Under case no. 14371/2011 (the s 424 case), the plaintiff instituted action against Monkam in this court for an order declaring Monkam personally liable to the plaintiff for the debts of Tulah under s 424 of the old Companies Act and for payment of the sum of R754 740. Mr Henning acted throughout for Monkam in the s 424 case. In May 2012, the plaintiff's attorney, Mr Mostert, received documents, pursuant to a subpoena *duces tecum* on the Standard Bank, showing the withdrawal from Tulah's bank account of the sum of R593 641,49 on 26 January 2010. This, Mostert said, was when the plaintiff learnt for the first time that the money had been taken by Monkam under colour of a writ. It was also the first time that the plaintiff learnt of the involvement of Mr Henning in the impoverishment of Tulah. I have referred to this aspect of the case in paragraph 4 above.

79 The s 424 case came before Bertelsmann J on trial. The learned judge handed down a written judgment on 26 September 2014 in which he upheld Tourvest's claim and declared Monkam personally liable to the plaintiff for R754 740 plus costs on the scale of attorney and client. An application for leave to appeal is pending.

80 In the judgment, Bertelsmann J criticised the failure of Monkam to call Mr Henning as a witness. The learned judge described Mr Henning as having been Monkam's legal advisor at all times relevant to the dispute. Paragraph 31 of the judgment states:

If there was any legally tenable basis for [Monkam's] alleged claims against TULAH, or any truth in his denial of any knowledge of the mistaken payment of which Mr Henning had indubitably been informed, Mr Henning was the person who could have sustained [Monkam's] version. The failure to call him amounts to a clear confirmation of the fact that [Monkam's] evidence must be rejected wherever it conflicts with that of the plaintiff.

81 In paragraph 32 of the judgment, Bertelsmann J found that Monkam's actions amounted to a clear fraud upon the plaintiff and upon Tulah. I have come to the same conclusion on the evidence presented to me. And I have found that on the strength of what was known to Mr Henning, he was a joint wrongdoer (*mededader*) in this regard with Monkam.

82 It was submitted by counsel for the plaintiff that a similar criticism should attach to Mr Henning for not calling Monkam. Monkam remains Mr Henning's client and it is not suggested that he was unable to call Monkam as a witness. Counsel for Mr Henning suggested that he could not be expected to call Monkam after Bertelsmann J had found him to be a liar and a fraud. I do not agree. The s 424 case is on appeal, presumably on the basis that Bertelsmann J erred in his findings against Monkam but in any event I do not think that the submission justifies the failure to call Monkam, the witness who could be expected, on Mr Henning's version, to support Mr Henning's version. In my view the failure to call Monkam justifies the inference that Monkam would have contradicted the defendant's case on issues

I have found to be material, particularly as to what Monkam told his attorney and when.

83 I think I should record my impressions of the witnesses who testified before me. I found the plaintiff's witnesses, Mesdames Folli, Suisie Monkam and Sirkissoo and Mr Mostert generally credible, in the sense that they tried to tell the truth as they recalled it. Mr Mostert was shown to be unreliable about certain details of the previous litigation but I find this to be the product of faulty memory. Mr Mostert testified on the aspects in which his recollection was found to be inaccurate without the benefit of documents, which were only produced after Mr Mostert had completed his evidence.

84 I found the defendant, however, to be a poor witness. He was garrulous. This does not by itself provide evidence of untruthfulness but my impression is that the defendant took refuge in garrulousness in an effort to throw the questioner off the track. The defendant's evidence was in many respects evasive and vague, in my view deliberately so, but he had a tendency to remember detail when that was likely to be in his favour.⁷ A most serious criticism of the defendant, of course, is that he does not hesitate to lie under oath when he thinks that will advance his case. Coupled with that is the fact that Mr Henning has no remorse for what he has done. He said in evidence that he would do things differently the next time such a situation arises; not because he appreciates or accepts that his

⁷ I do not overlook that in some instances documents produced showed that Mr Henning's memory was better than Mr Mostert's.

actions were wrong, but because of the trouble they landed him in. The words of Ponnann JA in relation to expressions of remorse by accused persons in criminal cases in *S v Matyityi* 2011 1 SACR 40 (SCA) para 13 come to mind:

There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. [footnotes omitted]

- 85 Although the plaintiff's claim was described in the particulars of claim as one arising from constructive contempt of court, in argument counsel for the plaintiff submitted that the proper description of the claim was one for damages arising from an abuse of the process of the court. I do not think that the fact, as such, that the plaintiff ascribed

the incorrect label to the claim, is of significance. The true question is whether the facts pleaded which have been proved constitute the delict of abuse of process.

- 86 The essential allegations in this regard are that the defendant, well knowing that his client Monkam had no claim against Tulah under paragraph 2.11, caused the issue and execution of a writ with the intention that his improperly obtained writ should strip Tulah of its only asset, with the intention of frustrating the plaintiff's efforts to recover the debt which Tulah owed the plaintiff.
- 87 Any conduct which constitutes an abuse of the process of the court is unlawful. Thus, in *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1993 SA 389 SCA at 412, the SCA referred with approval as reflecting our law the words of Lord Denning in *Goldsmith v Sperrings Limited* [1977] 2 All ER 566 (CA) at 574:

In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer ...

At other times the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper

purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law.

88 The SCA continued:

Die klem val telkens op die onbehoorlikheid van of die optrede of die oogmerk. In die Engelse reg, blykens die dictum, kan die misbruik van so n aard wees dat dit op n "tort" neerkom. By ons kan dergelike optrede in gepaste gevalle onder die algemene rubriek van "kwelsugtige gedingvoering" tuisgebring word (vgl, oor die algemeen, 15 Lawsa par 595 en volgende). Dit verg bewys van die afwesigheid van "reasonable and probable cause".

Die begrip "misbruik" veronderstel onbehoorlikheid (waarby ongeoorloofdheid inbegrepe is). Die onbehoorlikheid in die geval van misbruik van die hofproses kan geleë wees, in Engeland sowel as hier, of in die aard van die optrede van die betrokke litigant in die resultaat wat hy nastreef, of albei.

89 In *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 6 SA 66 SCA para 50, Southwood AJA described the delict of abuse of process:

It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process (see *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517; *Hudson v Hudson and another* 1927 AD 259 at 268; *Beinash v Wixley* [1997]

ZASCA 32; 1997 (3) SA 721 (A) at 734D; *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 412C-D), but no all-embracing definition of "abuse of process" has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process (per Innes CJ in *Western Assurance v Caldwell's Trustee supra* at 271 and in *Corderoy v Union Government (Minister of Finance) supra* at 517) and it has been said that "an attempt made to use for ulterior purposes machinery devised for the better administration of justice" would constitute an abuse of the process (*Hudson v Hudson and another supra* at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of *mala fides*. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. (*Brummer v Gorfil Brothers Investments (Pty) Ltd en andere supra* at 412I-J; 414I-J and 416B). **Accordingly, a plaintiff who has no *bona fide* claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process** (see *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) para 13). Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action (per Solomon JA in

Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 273-274). The importance of the right of access to courts enshrined by section 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with *bona fide* disputes (*Beinash and another v Ernst & Young and others supra* para 17). [My emphasis]

- 90 There can be no doubt that the conduct of Mr Henning, as I have found it to be, is abuse of process as described in the authorities which I have quoted. This does not mean, however, that an attorney who has doubts about the validity of his client's case abuses the process of the court by advancing that case. On the contrary, it is of the essence of our law that a lawyer entrusted by a client with his case must advance that case with the utmost vigour and effort, regardless of the lawyer's personal convictions relating to the validity of the client's cause of action or defence.
- 91 But what a lawyer in our legal system may not do is assert factual allegations, whether on affidavit or by putting propositions in cross-examination, which the lawyer *knows* are not true (as opposed to *suspects* may be untrue). This is so trite that the proposition requires no recitation of authority. And this is precisely what I have found that Mr Henning did.
- 92 Counsel for Mr Henning referred me to an impressive body of learning in support of the proposition that our law will be slow to impose upon an attorney who does all that he properly may do for a client a duty to

safeguard the interests of third party who is not his client. With respect to the industry which counsel applied to his brief, I think that this misses the point: we are not, on my analysis, dealing with an attorney who did all he properly could; the case relates to an attorney who acted improperly.

- 93 Counsel for the defendant referred me to *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 CC at para 21 where the Constitutional Court held that the wrongfulness enquiry focuses on the harm-causing conduct and whether the policy and legal convictions of the community, constitutionally understood, regard it as unacceptable. This is based on the duty not to cause harm and questions the reasonableness of imposing liability.
- 94 Applying this test, I have no hesitation in concluding that public policy demands that an attorney who abuses the process of court with the intention of causing harm to A, should be liable to A in damages. It follows that Mr Henning, who intended to cause harm to the plaintiff, should be held liable for the damages he is proved to have caused the plaintiff.
- 95 I turn to that question. A plaintiff in cases such as the present must prove a causal link between the conduct of the defendant and the damages allegedly suffered. This involves two distinct enquiries. The first is whether the unlawful conduct was a factual cause of the loss.

In this enquiry, the “but for” test must be applied. *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 A 700E.

- 96 Before one gets there, of course, the plaintiff must prove that it suffered damages. It is a curious feature of the present case that the plaintiff took no action against Tulah. This was a deliberate commercial decision. When the problem of the erroneous payment was discovered, the plaintiff was in the process of reorganisation. New investors had recently come on the scene and the plaintiff was reluctant to engage in litigation at that time. So, although the plaintiff's attorney's letter to Tulah of 13 November 2009 was written in terms of s 345 of the old Companies Act, ultimately giving rise to a presumption that Tulah could not pay its debts, the plaintiff did not apply for the liquidation of Tulah in 2009 even though a liquidation application was prepared. In 2010, the plaintiff once again considered liquidating Tulah but found out that Tulah was in the process of administrative deregistration and accordingly did not proceed. The plaintiff did not even take judgment against Tulah. Instead, the plaintiff proceeded directly (and, as I have shown, thus far successfully) against Monkam under s 424 of the old Companies Act and ultimately against Mr Henning.

97 There is before me no evidence as to Tulah's financial position. I do not think that the inference is warranted that Tulah had no assets upon which execution could be levied. There is simply no evidence in that regard. Nor is there any evidence of what dividend, if any, would probably have been paid by Tulah on liquidation. There is no evidence showing whether or not Tulah had any creditors other than the plaintiff. The plaintiff was a concurrent creditor of Tulah. There is no evidence showing whether or not Tulah had any secured or preferent creditors or that, if Tulah had been liquidated with the sum in question still in its bank account, there would have been any free residue on winding up from which the plaintiff would have received a dividend and, if so, in what amount.

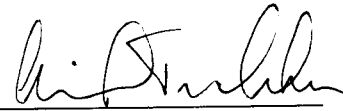
98 In short, it has not been proved on a balance of probabilities that but for the delict committed by Mr Henning, the plaintiff would have recovered any money from Tulah. On the evidence before me, the plaintiff cannot succeed. The proper order, in these circumstances, is one of absolution, leaving the plaintiff free, if it so wishes, to proceed afresh.

99 As to costs: Mr Henning has been substantially successful but I intend to deprive him of the costs normally awarded to a party to commercial litigation who is substantially successful. My reasons are firstly that almost no time was devoted during the trial to quantum and secondly

that Mr Henning's conduct both in the events which led to the present action and in the witness box has been reprehensible.

100 I make the following order:

- 1 The defendant is absolved from the instance;
- 2 There will be no order as to costs.



NB Tuchten
Judge of the High Court
11 February 2015