

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

CASE NO: A5060/22

Date: 28 August 2024

WJ du Plessis

In the matter between:

ANTONYS THEODOSIOU

First Appellant

DIMETRYS THEODOSIOU

Second Appellant

SOTYRIS CHRISTOS THEODOSIOU

Third Appellant

KYRIAKOS ANDREAS THEODOSIOU

Fourth Appellant

HYDE PARK 103 PROPERTIES (PTY) LTD

Fifth Appellant

UNIVERSAL RETAIL MANAGEMENT (PTY) LTD

Sixth Appellant

EDUCATED RISK INVESTMENTS 54 (PTY) LTD

Seventh Appellant

OAKDENE SQUARE PROPERTIES (PTY) LTD

Eighth Appellant

INVESTAGE 173 (PTY) LTD

Ninth Appellant

KYALAMI EVENTS AND EXHIBITIONS (PTY) LTD

Tenth Appellant

MOTOR MALL DEVELOPMENTS (PTY) LTD

Eleventh Appellant

UNIVERSAL PROPERTY PROFESSIONALS (PTY) LTD

Twelfth Appellant

UNIVERSAL RETAIL HOLDINGS (PTY) LTD	Thirteenth Appellant
SOTYRIS CHRISTOS THEODOSIOU N.O.	Fourteenth Appellant
JACQUES JOHAN MOOLMAN N.O.	Fifteenth Appellant
ANTONYS THEODOSIOU N.O.	Sixteenth Appellant
JACQUES JOHAN MOOLMAN N.O.	Seventeenth Appellant
DIMETRYS THEODOSIOU N.O.	Eighteenth Appellant
JACQUES JOHAN MOOLMAN N.O.	Nineteenth Appellant
and	
SCHINDLERS ATTORNEYS	First Respondent
IMPERIAL LOGISTICS LIMITED	Second Respondent
NEDBANK LIMITED	Third Respondent
RICHARD KEAY POLLOCK, N.O.	Fourth Respondent
MARYNA ESTELLE SYMES, N.O.	Fifth Respondent
OLGA KOTZE, N.O.	Sixth Respondent

JUDGMENT

DU PLESSIS AJ (WITH WHOM CRUTCHFIELD J AND WILSON J AGREE)

- [1] This is an appeal against the judgment of Booyesen AJ¹ upholding the second and third respondents' exception to the appellants' particulars of claim. The plaintiffs before Booyesen AJ, being the appellants before this Court, ("the appellants"), issued summons to set aside two orders granted by the late Van der Linde J on 14 November 2018. These two orders were said to be vitiated

¹ Handed down 19 January 2022, *Theodosiou v Schindlers Attorneys* [2022] 2 All SA 256 (GJ).

because they gave effect to an illegal contingency fee agreement. It was further contended that even if the contingency fee agreement was valid, the appellants' erstwhile attorneys' failure to comply with s 4 of the Contingency Fees Act² ("the Act"), before the two orders were made, meant that Van Der Linde J had no power to grant them. The second and third respondents excepted to the particulars of claim on the grounds that they lack the necessary averments to sustain a cause of action, alternatively that they are vague and embarrassing.

- [2] On 19 January 2022, Booysen AJ delivered judgment upholding various exceptions raised by the second and third respondents against the appellants' particulars of claim and ordered that specific paragraphs thereof be struck out.
- [3] The appellants contend that the Court below disregarded material averments in the appellants' particulars of claim, which ought to have been accepted. This relates mainly to the interpretation of s 4 of the Act and whether a court has a discretion to make a settlement agreement an order of court where a contingency fee agreement is in place, regardless of whether there was compliance with s 4 of the Act.
- [4] The appellants' particulars of claim relate to various settlement agreements made orders of court by Van der Linde J on 14 November 2018. These settlements pertained to several litigious matters that were settled and embodied in the two orders:
 - i. The first order included the "Imperial Settlement Agreement" that was concluded between several of the appellants and the first to third respondents, where existing litigation was settled. It also included the "Schindlers Settlement Agreement," which was concluded between the first respondent and various appellants. These agreements were made an order of the court by Van der Linde J (the "first Van der Linde order");

² 66 of 1997.

- ii. The second order consolidated various actions³ in which the third respondent, Nedbank, was the plaintiff. This is the “second Van der Linde order”.

- [5] Schindlers represented some of the appellants in litigation from 2011 until the conclusion of the settlement agreements. When Schindlers realised between July 2013 and October 2014 that the appellants could not afford their professional services in respect of the litigious matters, they agreed to act “on risk.” Schindlers concluded an oral “on risk” contingency fee agreement (the “Schindlers Contingency Fee Agreement”). In light of s 3 of the Act, such a contingency fee agreement is a nullity for non-compliance with the Act. This much is common cause.
- [6] The litigious matters that were consolidated and settled included litigation against the various respondents. The two Van der Linde orders (including the Schindlers Settlement Agreement and the Imperial Settlement Agreement) were meant to settle the various disputes between Schindlers, Nedbank, Imperial and the appellants.
- [7] The crux of the appellants’ appeal is that the Schindlers Contingency Fee Agreement was in existence but illegal and a nullity for non-compliance with the Act at the time of settling the disputes. Section 4(1) of the Act is clear that any offer of settlement made to any party who has entered into a contingency fee agreement may only be accepted *after* the legal practitioner has filed an affidavit with the court, provided that there is compliance with the remaining provisions of s 4. This did not happen.

The issues on appeal

- [8] The specific grounds of appeal advanced at the hearing were that the Court below erred in striking out specific paragraphs and prayers in the particulars of

³ Under case numbers 2012/36890 and 2013/09463.

claim and by *not* dismissing the exception on the basis that the Schindlers Settlement Agreement was invalid for non-compliance with s 4 of the Act.⁴

- [9] The appellants argue that the Court below applied s 4 of the Act incorrectly. They contend that s 4 is peremptory and that a court does not have a discretion on whether to make a settlement agreement an order of court in circumstances where there is non-compliance with s 4 of the Act. Furthermore, should there be such a discretion, then the pre-conditions of s 4 apply, regardless of whether the remedy in s 5 of the Act is available.
- [10] The appellants contend that based on the Act's purpose, there are limited exceptions to the common law prohibition on contingency fees and that it is subject to strict limitations imposed by the Act. There is further no scope for developing the common law prohibition on contingency fee agreements because there cannot be two systems of law governing the same subject matter. Lastly, the courts need to have regard to the importance of protecting litigants subject to contingency fee agreements in the context of settlements.
- [11] The appellants emphasise that s 2(1) of the Act is intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements and that such an agreement must be within the parameters of the Act. The appellants draw the inference that since there is no room for a legal practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act, it follows that once such an agreement is concluded, there is no room for the parties to operate outside of the provisions of the Act, as this would render the purpose and provisions of the Act ineffectual.
- [12] Furthermore, the appellants argue that the safeguards in the Act are included to ensure that the supervisory and monitory processes of the courts are present whenever matters litigated under the Act are settled or finalised. This means

⁴ 66 of 1997.

that if non-compliance with section 4 of the Act is permitted, the purpose of the Act will be defeated.

The second and third respondents' argument

- [13] The second and third respondents ("the respondents"), argue that the relief sought by the appellants is unsustainable and the appeal must fail. They contend that, as a matter of law, non-compliance with s 4 of the Act does not render the settlement agreements illegal and void. If the respondents are correct in this regard, then that is the end of the appeal. This, however, should not be confused with an invalid *contingency fee agreement* due to non-compliance with the Act, which is a nullity.
- [14] The respondents allege that no contingency fee agreement was in place when the first and second Van der Linde J orders were made, so the Act does not apply. This is because the Schindlers Settlement Agreement is not a contingency fee agreement. Rather, it is an agreement to pay a specified amount in full and final settlement of fee disputes that had previously arisen.
- [15] Furthermore, on a reasonable interpretation of the Schindlers Settlement Agreement, it is a settlement or compromise between the parties to fully and finally settle all matters related to any and all of the claims arising from the specified contracts and the rendering of legal services, including the Schindlers Contingency Fee Agreement. Such a compromise is legally binding, even if the original contract is invalid.⁵
- [16] Schindlers, at that time, no longer represented the appellants. In other words, any alleged contingency fee agreement that the Act may have regulated had been replaced by the Schindlers Settlement Agreement.
- [17] As to the appellants' remaining claims, the respondents argue that the appellants' claims are vague and embarrassing and that no case for fraud or

⁵ *Mathimba v Nonxuba* 2019 (1) SA 550 (ECG).

justus error, good cause or any other basis for rescission is made out. The appellants' averments do not establish that the first Van der Linde order was sought or granted in their absence but by consent. The appellants agreed to the order.⁶

[18] Moreover, the appellants made payments in terms of the second Van der Linde order, indicating that they abided by the judgment. Thus, in terms of the doctrine of peremption, the appellants are bound by it.

[19] Lastly, the appellants did not make out a cause of action for the money judgment.

[20] *McKenzie v Farmers' Co-Operative Meat Industries Ltd*,⁷ dealt with an exception on the ground of no cause of action. The court therein stated that pleadings should contain every fact that, if traversed, is necessary to prove in order to support the litigant's right to a judgment of the court. It is thus necessary to compare the facts pleaded by the appellants in the particulars of claim against the relevant substantive law, in order to identify if the *facta probanda* necessary to succeed in the cause of action were pleaded.

The appeal

[21] There are, thus, essentially two questions that this court must decide on in order to determine whether there is a cause of action properly pleaded:

- i. Firstly, whether an offer of settlement made between a legal representative and their client who had signed a contingency fee agreement is, upon acceptance of such an offer, to be regarded (without further explanation) as having the effect of causing the parties' rights and claims to be regarded as fully and finally settled and compromised, with the result that the provisions of the Act fall away and s 4 does not apply.

⁶ *Dabner v South African Railways and Harbours* 1920 AD 583 at 594.

⁷ *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

In other words, upon a client's acceptance of a settlement agreement on fees, the parties have reached a compromise on the fees that replaces the contingency fees agreement, and s 4 is no longer applicable. If this is so, then that is the end of the matter.

- ii. If that is not so, then the second question is whether non-compliance with section 4 of the Act⁸ renders a settlement agreement made on the issues litigated, illegal and void. In this regard, it is essential to distinguish between the effect of noncompliance on the contingency fee agreement itself and the effect on the settlement agreement made pursuant to the litigation to which the contingency fees relate.

[22] The question will be answered with reference to the various prayers in the particulars of claim.

(i) The prayers declaring the orders a nullity, invalid and falling to be set aside

[23] Firstly, the respondents correctly argue that it is not competent to apply for an order declaring the Van der Linde orders a nullity⁹ or to take them on review.¹⁰ The appellants need to appeal the order. The only other basis for setting an order aside is rescission, which will be discussed below.

[24] Even if that would be possible, the appeal must fail as the appellants' argument that Van der Linde J did not have the authority to make the settlement agreements an order of court as there was non-compliance with s 4 of the Act, cannot hold. This will be addressed in detail below, as this seemed to be the crux of the appellants' argument.

⁸ 66 of 1997.

⁹ *Wallach v High Court of South Africa (Witwatersrand Local Division)* [2003] ZACC 6.

¹⁰ *Borman v Minister of Defence* 2007 (2) SA 388 (C) at para 15.

- [25] For the Act to apply, the agreement must be a contingency fees agreement. The definition of such an agreement is provided in s 2(1) of the Act in the following terms: [own emphasis]

Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed—

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

- [26] Thus, the Act clearly deals with an agreement between the legal practitioner and a client regarding the fees to be paid to the legal practitioner for representing the client in an action. The parties had an oral agreement until they concluded the Schindlers Settlement Agreement.

- [27] The purpose of the Schindlers Settlement Agreement is to “fully and finally settle all matters related to any and all claims that have arisen or may arise among any of them related to the Specified Contracts and the rendering of legal professional services and legal representation by Schindlers to the Debtors and any of the Related Entities”. It is clear that the Schindlers Settlement Agreement is meant to settle the legal fees owed to Schindlers. The next question is then whether this is the “settlement” that is intended in s 4 of the Act.

- [28] The effect of a settlement agreement was stated again in *Road Accident Fund v Taylor*,¹¹ namely that

[36] The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a

¹¹ *Road Accident Fund v Taylor* 2023 (5) SA 147 (SCA).

compromise is not itself *res iudicata* (literally 'a matter judged') but has that effect).

[29] By signing the Schindlers Settlement Agreement, the parties to that agreement abandoned the Schindlers Contingency Fee Agreement and entered into a compromise as a final settlement regarding the fees. This means that there is no contingency fee agreement, and s 4 of the Act is not applicable. This is then the end of the matter, and the appeal must fail.

[30] Even if I am wrong on the above, the appeal must fail because the Schindlers Settlement Agreement is not the settlement agreement referred to in s 4 of the Act. Section 4 of the Act states the following [own emphasis]:

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating—

- (a) the full terms of the settlement;
- (b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;
- (c) an estimate of the chances of success or failure at trial;
- (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
- (e) the reasons why the settlement is recommended;
- (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and
- (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating—

- (a) that he or she was notified in writing of the terms of the settlement;
- (b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
- (c) his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.

[31] Section 4 thus deals with the agreement between an attorney and a plaintiff or defendant and sets out the requirements that must be complied with before a settlement on the litigation can be made.

- [32] The appellants emphasise that s 4(1) of the Act refers to any offer of settlement and not just settlements made in respect of the merits of the case. Instead, it is *any* offer made to any party who has entered a contingency fees agreement. On this reasoning s 4 is applicable to the Schindlers Settlement Agreement. This cannot be correct.
- [33] A reading of s 4(1) clearly indicates that the settlement refers to the litigation to be settled with the signing of the settlement agreement. This is evident from the words “taking the matter to trial”, “chances of success or failure at trial”, and “compared to taking the matter to trial”. It thus refers to a settlement of the litigation and not a settlement between the legal practitioner and the client who elected to settle the fees in terms of a settlement agreement.
- [34] If I am wrong on both points above, the appeal must fail because an invalid contingency fees agreement does not invalidate the settlement agreement. In *Mofokeng v Road Accident Fund*¹² the court emphasised the monitoring function regarding contingency fee agreements, explicitly ensuring compliance with s 4 of the Act.
- [35] The appellants regard compliance with s 4 of the Act as obligatory when accepting a settlement agreement. They rely on *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*,¹³ where the court held that s 4 means that matters may only be settled *after* affidavits from the legal practitioner and client have been filed.
- [36] However, in *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd*¹⁴ the Supreme Court of Appeal clarified that when a litigant has entered into an unlawful agreement with a third party to provide funds to finance his case,

¹² *Mofokeng v Road Accident Fund* [2012] ZACPJHC 150.

¹³ *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2013] ZAGPPHC 34.

¹⁴ *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 48.

that is a matter that is extraneous to the dispute between the litigants and is, therefore, irrelevant to the issue arising in the dispute, whatever the cause of action may be. Thus, the illegality of the agreement between a plaintiff and his legal representatives cannot be a defence to the action.

[37] The appellants contend that the facts in this case differ from those in *Price Waterhouse Coopers*. In the latter case, the contingency fees agreement was *extraneous* to the dispute between the litigant and the party. In the case before us, the appellants submit that the Schindlers Settlement Agreement itself is unlawful because it is not “extraneous to the dispute”. The appellants argue that the Schindlers Settlement Agreement settled the dispute between Schindlers and the appellants, and the Schindlers Contingency Fee Agreement must comply with s 4 of the Act. Given that the latter did not comply, the Schindlers Settlement Agreement is invalid due to non-compliance with s 4 of the Act. This cannot be so, as this does not detract from the fact that the Schindlers Settlement Agreement was intended to settle the legal fees. It remains a settlement of legal fees, and not of the underlying litigious disputes between the parties.

[38] In *Road Accident Fund v MKM obo KM*,¹⁵ the Supreme Court of Appeal approved of the conclusion of the Court below that while non-compliance with the Act rendered the agreements invalid and void, it does not invalidate any related settlement agreement made an order of court without *justus error*, fraud or public policy considerations. The Supreme Court of Appeal stated that this position is “undoubtedly correct”, as it accords with the general principle set out in *Price Waterhouse Coopers*. There are no allegations of *justus error*, fraud or public policy as to why such a settlement is not possible in the matter before us. I see no reason why the principle in *Price Waterhouse Coopers* should not apply equally in this case.

¹⁵ *Road Accident Fund v MKM obo KM* 2023 (4) SA 516 (SCA) (“MKM”).

[39] The appellants argue that the court in *MKM* did not find that the settlement agreement will always be valid despite non-compliance with s 4 of the Act. In other words, this matter is different since the only purpose of the Schindlers Settlement Agreement was to settle the appellants' indebtedness to Schindlers. This argument has been dealt with above.

[40] It follows that the first Van der Linde order cannot be declared a nullity, invalid and set aside for the reasons stated above.

(ii) The agreements were interlinked

[41] The appellants submit that if the Schindlers Settlement Agreement is invalid, it renders the other agreements invalid, as they are interlinked.¹⁶ The Schindlers Settlement Agreement and the Imperial Settlement Agreement refer to each other and form part of the same transaction - the settlement of the appellants to Schindlers under the Schindlers Contingency Fee Agreement.

[42] The appellants further submit that Schindlers was party to both agreements – this shows that the Imperial Settlement Agreement was not a mere settlement on the merits of the litigation but part of the transaction to settle the appellants' indebtedness to Schindlers under the Schindlers Contingency Fee Agreement.

[43] I do not agree. The Imperial Settlement Agreement deals with the “indivisible full and final settlement of all disputes [...] between the Parties in relation to the Company and to the winding-up of the Company”. The only reference to the Schindlers Settlement Agreement is that to give effect to *that* agreement, the members of the appellants nominate, authorise and instruct the liquidators to make payment to the Schindlers Trust Account for the payment of the fees as agreed to in the Schindlers Settlement Agreement.

¹⁶ By relying on *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* (1) [2002] ZASCA 66.

[44] The appellants referred us to *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service*¹⁷ where the Constitutional Court stated that there is an inextricable link when an issue, claim, contract or conduct cannot be determined or assessed without another or if the legal consequence of the one cannot be understood or measured without reference to another. Counsel then makes the argument that “the effect of the inextricable link between the Schindlers Settlement Agreement, the Imperial Settlement Agreement and the second Van der Linde order is that the invalidity of the Schindlers Settlement Agreement renders the Imperial Settlement Agreement and the second Van der Linde order invalid.” The transaction, they submit, could not succeed by the conclusion of the Schindlers Settlement Agreement or the Imperial Settlement Agreement alone – they were both necessary to settle the appellants' indebtedness to Schindlers in terms of the agreement. The two were so interlinked that the Schindlers Settlement Agreement was “subject to the proper execution of the” Imperial Settlement Agreement.

[45] I disagree. While the issues might be linked, there is not an inextricable link where an issue, claim, contract or conduct cannot be determined or assessed without another or if the legal consequence of the one cannot be understood or measured without reference to another. They settled different issues between the same parties. This argument of the appellants also fails.

(iii) In summary

[46] The agreement reached between the appellants and Schindlers (“the Schindlers Settlement Agreement”) was not a “contingency fee agreement” within the meaning of the Act. It merely settled indebtedness arising from legal services provided to the appellants by Schindlers. It replaced an agreement to litigate “on risk” between the appellants and Schindlers. Although that agreement might, in itself, have been regulated by the Act or have been void for

¹⁷ *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service* 2021 (4) SA 390 (CC) para 44.

non-compliance with the Act, that is something different. The “on risk” agreement, even if void, does not affect the validity of the Schindlers Settlement Agreement, which is enforceable on its face, and to which the Act does not apply. The Act accordingly presented no barrier to Van der Linde J endorsing the Schindlers Settlement Agreement, because there was no contingency fee agreement in place at the time that Van der Linde J did so.

[47] In any event, even if the Schindlers Settlement Agreement can somehow be characterised as a contingency fee agreement, Schindlers’ failure to file the affidavit required under section 4 of the Act does not invalidate the agreement or the order of court that endorsed it. This is because the fee dispute between Schindlers and the appellants was extraneous to the causes of action that were extinguished by consent between the parties to the two orders made by Van der Linde J. As the Court below held, things might have been different if it could be shown that the two consent orders were obtained by fraud, in a manner contrary to public policy or as a result of *justus error*,¹⁸ but that was not the case advanced on the appellants’ particulars of claim. The Court below’s approach in this respect has been endorsed by the Supreme Court of Appeal in *Road Accident Fund v MKM obo KM*,¹⁹ and there is no basis for us to interfere with it on appeal.

[48] Accordingly, the appellants’ prayer to declare the orders a nullity and invalid and to set them aside does not disclose a cause of action.

(iv) The prayer to rescind the judgments

[49] The orders can only be rescinded in terms of rule 42(1) or the common law.

[50] The requirement for a rescission in terms of rule 42(1)(a) is that the order or judgment had to be erroneously sought or granted in the absence of any party

¹⁸ See *Theodosiou v Schindlers Attorneys* 2022 (4) SA 617 (GJ), para 76.

¹⁹ 2023 (4) SA 516 (SCA), para 40.

affected thereby. Common law requires that the judgment was obtained by fraud or *justus error*; or if the party in default can show sufficient cause.²⁰

[51] If the order was given in the absence of another party, the applicant for rescission must give a reasonable explanation for their default, the application must be *bona fide* and not brought merely to delay the plaintiff's claim, and the applicant must show that they have a *bone fide* defence to the plaintiff's claim.²¹

[52] The argument as to the impact of s 4 of the Act on the settlement agreements has been fully set out above. The appellants application for rescission, did not make out a case for fraud or *justus error*, let alone that the orders were granted in the absence of the appellants. The latter consented to the order.

[53] The Court below emphasised that *Botha v Road Accident Fund*²² held that a court order that recorded a settlement agreement cannot be rescinded. A settlement can only be set aside on the grounds of fraud or *justus error*, where the error serves to rescind, nullify or void consent – it cannot relate to the disputed merits or the reason for the settlement. Parties cannot go back on their bargain because of unilateral mistakes.

[54] Thus, rescission is not available to the appellants as they were not absent when the order was made – they agreed to it. As the Court below correctly stated, once there is an agreement, it can only be set aside if there is fraud or *justus error*.

[55] Accordingly, prayers 3, 4.1 and 7 do not disclose a cause of action.

(v) Pay back the monies to Nedbank

²⁰ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at par 4.

²¹ *Naidoo v Cavendish Transport Co (Pty) Ltd* 1956 (3) SA 244 (N) at 248E

²² *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA).

[56] Prayers 8 and 9 are only competent if the other prayers succeed, which they do not. The only alternative, as the court *quo* pointed out, is unjustified enrichment, and no such case was made out by the appellants.

[57] Accordingly, prayers 8 and 9 do not disclose a cause of action.

Conclusion

[58] For the reasons set out above, the plaintiff's particulars of claim failed to disclose a cause of action and the exception was correctly upheld by the Court below. It follows that the prayers be struck out as ordered by the Court below. This is what the Court below found, and I agree.

Order

[59] I, therefore, make the following order:

1. The appeal is dismissed with costs, including the costs of two counsel and senior counsel where utilised, which costs include the costs of the applications for leave to appeal.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

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Date of the hearing:

05 June 2024

Date of judgment:

28 August 2024