



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

[REPORTABLE]

Case no: A 262/2025

In the matter between:

JOHANNES HENDRIKUS DU PLESSIS N.O.

AYESHA MOHAMED AYOB N.O.

JOHANNES HENDRIKUS DU PLESSIS

JASON MORRIS

First appellant

Second appellant

Third appellant

Fourth appellant

and

THE STANDARD BANK OF SA LTD

GORDON, JAYSON

FORD, LLEWELLYN

GREEN, KLEIN

THE MASTER OF THE HIGH COURT, CAPE TOWN

ALAN RICHARD NEWTON N.O.

CRATOS CAPITAL (PTY) LTD

CYGNE BLEU (PTY) LTD (IN LIQUIDATION)

First respondent

Second respondent

Third respondent

Fourth respondent

Fifth respondent

Sixth respondent

Seventh respondent

Eighth respondent

Coram: ERASMUS, SHER et RALARALA JJJ

Summary: Appeal- attorney-client costs orders made *de bonis propriis* against co-liquidators and their attorney in an application to strike out paragraphs in a supplementary answering affidavit on the grounds that they were scandalous, vexatious and irrelevant, and an application to admit such affidavit as a further affidavit.

Held 1) The power to strike out scandalous, vexatious and irrelevant material in 'any

affidavit', in terms of rule 6(15) of the Uniform Rules, is a power which can only be exercised in respect of the three permitted sets of affidavits which are provided for in ordinary applications by rule 6 i.e. the founding, answering and replying affidavits which may be filed in terms of subrules 6(1), 6(5)(d)(ii) and 6(5)(e), or any further affidavit which the Court thereafter permits in the exercise of its discretion, in terms of rule 6(5)(e). Consequently, an application to strike out material in a further affidavit which a party seeks to have admitted in terms of rule 6(5)(e), can only be heard and determined after the Court has held that the further affidavit may be admitted.

2) Costs orders *de bonis propriis* against a liquidator, or a legal practitioner who has acted for a party, may be made without them being formally joined to the proceedings as a party- it is sufficient if they are given *audi alteram partem* i.e. notice that such an order is being sought and an opportunity to be heard in respect thereof. The difference between the principles of joinder and those of *audi alteram partem* discussed.

ORDER

On appeal from: The Western Cape Division of the High Court (De Waal AJ, sitting as a court of first instance):

1. Save to the extent set out in paragraphs 2 and 3 below the appeal is dismissed, with no order as to costs.
2. Paragraph (b) of the order which was made by the court *a quo* in its judgment of 16 November 2023 is set aside and replaced with the following:
'(b). The applicants' application to strike out the paragraphs or parts thereof listed in paragraph 2 of the notice of motion dated 6 November 2023 is dismissed, with no order as to costs.'
3. The appellants' legal representatives shall be entitled to charge or recover from the estate of the eighth respondent (in liquidation) no more than 10% of the fees incurred in relation to the copying, preparation and perusal of the appeal record.

JUDGMENT DELIVERED (VIA EMAIL) ON 20 JANUARY 2026

SHER J (ERASMUS J et RALARALA J concurring):

1. This is an appeal¹ against orders which were made whereby 1st and 2nd appellants, being the liquidators of the eighth respondent Cygne Bleu (Pty) Ltd, and the attorney who acted for them (4th appellant), were held liable for the costs of two interlocutory applications, on the attorney-client scale, *de bonis propriis*.

The relevant facts and circumstances

2. The matter has its genesis in a complex set of background circumstances that were not set out in the judgment of the court *a quo*, which concern the trading, clearing and settlement of derivative instruments via a so-called 'clearing house' of the Johannesburg stock exchange, Cratos Capital (Pty) Ltd ('Cratos'), for and at the alleged instance of Cygne Bleu, in conjunction with Standard Bank Ltd (the 1st respondent). For the purposes of this judgment it is not necessary to set these circumstances out in detail. The brief conspectus which follows is drawn from the judgment of Binns-Ward J in the related matter of *Cratos Capital (Pty) Ltd v Zimri Investments CC & Another*.²
3. In or about 2021 it was alleged that pursuant to certain fraudulent actions which had been carried out in relation to the activities referred to in the preceding paragraph, Cygne Bleu became indebted to Cratos for over R 26 million on so-called 'variation margins', for which Cratos in turn had to account to Standard Bank. As Cygne Bleu failed to pay what was allegedly due and owing to Cratos it was placed into liquidation by it. A related claim for over R 25.3 million, by Standard Bank against Cratos, succeeded in an arbitration which was held in November 2021. In the arbitration Cratos contended that one of its employees and an employee of Cygne Bleu, together with employees of Standard Bank

¹ With the leave of the Supreme Court of Appeal.

² [2022] ZAWCHC 87 paras 8-9.

- (2nd to 4th respondents³) and the JSE, had been involved in unlawful manipulations of the derivatives market.
4. In due course an enquiry into the affairs of Cygne Bleu was convened in terms of ss 417-418 of the Companies Act,⁴ before a commissioner appointed by the Master (6th respondent), who took evidence from various witnesses in the periods between April-October 2021 and March-July 2022.⁵
 5. On 20 September 2022 Standard Bank and its employees issued an application in which they sought an order declaring that the enquiry constituted an irregular proceeding and that the evidence which was given before it in the period between 13 and 15 July 2022, should be 'set aside'. The premise underlying the application was that the Bank and its employees should never have been involved in the enquiry, as they were not concerned with the affairs of Cygne Bleu.
 6. Answering affidavits were filed by the liquidators on 24 February 2023 and a replying affidavit was filed on 13 March 2023, and in due course the application was set down for hearing on 30 November 2023.
 7. On 18 October 2023 the liquidators lodged an interlocutory application in which they sought leave to file a supplementary answering affidavit and the striking out of certain paragraphs in the Bank's replying affidavit (on the grounds that they were scandalous, vexatious and/or irrelevant), together with an order granting them condonation⁶ for the use of the entire record of the proceedings in the ss 417-418 enquiry, comprising over 3000 pages, which they annexed. In the supplementary answering affidavit the 1st appellant said that he believed it was 'imperative' for the court to read the entire transcript of the enquiry in order for it to get a 'full and clear picture as to the atrocities that had occurred' and the serious allegations that had been made by the enquiry's witnesses against the Bank and its employees. Consequently he sought leave to use the

³ In the proceedings before the court a *quo* an additional employee of the Bank, one Shaun Lantermans, was cited as the 5th respondent. For some unexplained reason, presumably due to an oversight in the preparation of the appeal record, he was not cited in the appeal.

⁴ Act 61 of 1973.

⁵ It was alleged that the enquiry which was first convened and which sat in 2021 was irregular, as a result of which a second enquiry was convened, which took evidence in July 2022.

⁶ In terms of s 417(7) of the Act the proceedings of any examination or enquiry which is held in terms of ss 417-418 shall be private and confidential, unless the Master or the Court, either generally or in respect of a particular person, directs otherwise.

- entire transcript, 'in the interests of justice', so that it could assist the court to arrive at a resolution of the matter.
8. In response to the filing of this application the Bank and its employees in turn filed an application to strike out several paragraphs in the supplementary answering affidavit, on the grounds that they constituted a personal attack on the good name and reputation of their senior counsel and attorney, in a manner which was scandalous, vexatious and irrelevant to the issues requiring resolution. In the alternative, their legal representatives sought leave to intervene in the proceedings in their personal capacity. In addition, the Bank and its employees filed an answering affidavit in which they opposed the application for the admission of the supplementary answering affidavit, on the grounds that its contents and the annexed record of the ss 417-418 enquiry were wholly irrelevant.
 9. In a pre-trial meeting which was convened by the court *a quo* it was agreed that the main application could not be heard on 30 November 2023, and the day would instead be used for argument on the interlocutory applications and the issue of liability for the wasted costs which were occasioned by the postponement of the main application.
 10. At the commencement of the hearing the liquidators' counsel indicated that they were no longer persisting with their striking out application and were accordingly withdrawing it. Consequently, the only issue that remained in respect of it was the liability for its costs. The court *a quo* then proceeded to hear argument from the parties on the remaining aspects of the applications before it.
 11. In a detailed judgment which it handed down it dealt, separately and consecutively, with the liquidators' (withdrawn) striking out application (the costs of which it held were to be borne by them *nomine officio*), the Bank's striking out application (which it upheld), the conditional application by the Bank's legal representatives for leave to intervene (which it held was not necessary for it to decide), and the liquidators' application for the admission of the supplementary answering affidavit (which it dismissed). Finally, it ruled on the wasted costs that were occasioned by the postponement of the main application.
 12. In consequence of several of these rulings it made a series of *de bonis propriis* costs orders on the attorney-client scale (including the costs of two counsel), against the liquidators, and in one instance also against their attorney, jointly

and severally. The two orders which are the subject of the appeal⁷ are those which were made⁸ in respect of the Bank's striking out application, the costs of which the court held were to be borne by the 1st appellant (his co-liquidator the 2nd appellant was not included) and his attorney (the 4th appellant), who had apparently drafted the supplementary answering affidavit, and the costs pertaining to the liquidators' failed application for the admission of the supplementary affidavit, which the court directed were to be borne by both of them, but not their attorney.

13. In their notice of appeal the appellants claimed that the court *a quo* misdirected itself in numerous respects. In the first place, it had erred in ruling on the Bank's striking out application and directing that it was to be upheld and that, as a result, certain paragraphs of the supplementary answering affidavit should be struck out, before ruling on whether the supplementary answering affidavit was to be admitted as an affidavit in the proceedings. They averred that before an affidavit additional to the three which were allowed for by rule 6 was admitted, it was not before the court, and therefore nothing could be struck from it. As the application for the admission of the supplementary answering affidavit was dismissed the entire affidavit was ruled to be inadmissible, and there could accordingly not be an order preceding it, striking anything out of it. Furthermore, having ruled that certain parts of the supplementary answering affidavit were to be struck out, the court *a quo* misdirected itself in thereafter nonetheless having regard for the contents of the affidavit in its unexpurgated form, when considering the issue of costs. Thirdly, the appellants contended that ruling on the striking out application and then the application for the admission of a further affidavit resulted in punitive costs orders being made against them in respect of each application, and they had therefore been unfairly penalized with a double sanction.
14. In the fourth place, the appellants contended that the court erred in making a costs order against the 2nd appellant, as she was not the author of the

⁷ Leave to appeal was not sought in respect of the costs orders which were made in relation to the liquidators' striking out application, which was withdrawn, where party-party costs were awarded against the liquidators *nomine officio* i.e. against the estate of Cygne Bleu (in liquidation), and the postponement of the main application, in which attorney-client costs were awarded against the liquidators *de bonis propriis*.

⁸ Paragraphs 53(b)-(d) of the judgment.

supplementary answering affidavit and had therefore not made any of the averments in it which were offensive and which were struck out, and had also not confirmed them in her confirmatory affidavit. She had simply confirmed the contents of the supplementary answering affidavit insofar as they pertained to her and confirmed that the 1st appellant was attending to the administration of the 8th respondent's estate and had her authority to bring and defend any actions, regarding the estate. Thus, so they contended, as the 2nd appellant had not been party to the application for the admission of the supplementary answering affidavit and the additional evidence which it sought to introduce, she should not have been mulcted personally in costs.

15. In their heads of argument the appellants raised a further ground of appeal. They contended that, as a matter of law, the court *a quo* had erred in granting a costs order against them as liquidators, and against their attorney, without joining them to the proceedings 'personally' i.e. in their personal capacity. In this regard they sought to rely on the decisions in *Ex parte Minister of Home Affairs*⁹ and *Black Sash Trust* (2017)¹⁰ (also known as *Black Sash II*).

The principles applicable

(a) De bonis propriis orders

16. It is trite that generally, costs are awarded only against parties to a suit and usually against the loser. These are commonly only allowable, taxable costs of suit on the tariff basis provided for by the rules of court i.e. costs on the so-called party/party scale. However, where the court considers it necessary that the winning party be wholly indemnified against all the costs it has incurred in litigation and/or where it wishes to express its displeasure at the conduct of a party, it may award so-called attorney-client costs.
17. In certain instances costs orders are made *de bonis propriis* i.e. 'out of their own pocket', against persons who were not parties to a suit, or who were parties in a representative capacity. In the case of the latter category such persons are commonly functionaries or public officials who occupy certain positions e.g. such as a Minister, Director-General or Head of a government department or

⁹ *Ex parte Minister of Home Affairs & Ors; In re: Lawyers for Human Rights v Minister of Home Affairs & Ors* [2023] ZACC 34; 2024 (2) SA 58 (CC).

¹⁰ *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* ('*Black Sash Trust II*') [2017] ZACC 20; 2017 (9) BCLR 1089 (CC).

organ of state, or the CEO of a state entity. Other such persons against whom such orders have been made include trustees (of trusts or the insolvent estates of individuals) and liquidators or executors, who are tasked with administering and winding-up estates. In the case of the former category i.e. persons who are not parties to a suit, *de bonis propriis* costs orders are sometimes made against attorneys or advocates, who acted for a party.

18. Our highest courts have repeatedly warned that, because personal (*de bonis propriis*) and attorney-client cost orders are both punitive and extraordinary in nature, they should not be awarded 'willy-nilly', but only in exceptional circumstances.¹¹
19. It does not necessarily follow that where a personal i.e. a *de bonis propriis* costs order is to be made against an individual, it must be on the attorney-client scale, as opposed to the party-party scale, and imposing costs on the one hand and costs on a personal basis on the other, are two different issues. As was pointed out in *Public Protector I*,¹² the imposition of costs on an attorney-client scale in a *de bonis propriis* award is an additional punitive measure and can be viewed as 'double punishment'. Although the tests for these two types of costs orders may overlap there must be an independent, separate enquiry in respect of each of them.¹³
20. Personal costs orders against public officials, even if awarded on the party-party scale, are by nature punitive,¹⁴ because officials ordinarily only get mulcted in costs in their official capacity, on behalf of the department or organ of state they represent. Whether a *de bonis propriis* costs order is justified in the case of a public official is determined by having regard to the 'institutional competence' required of them, given the position they occupy and the duties they must discharge, and their constitutional, statutory and ethical obligations, as imposed by the Constitution, legislation, and ethical rules or codes of conduct.¹⁵

¹¹ *Public Protector v SA Reserve Bank* ('*Public Protector I*') [2019] ZACC 29; 2019 (6) SA 253 (CC) para 220; *Road Accident Fund v Hlatshwayo & Ors* [2025] ZASCA 17 para 28.

¹² *Public Protector I* para 220; *Ex parte Minister of Home Affairs* n 8 para 91.

¹³ *Id.*

¹⁴ *Public Protector v Commissioner, SA Revenue Services & Ors* [2020] ZACC 28; 2022 (1) SA 340 (CC) para 33 ('*Public Protector II*').

¹⁵ *Black Sash II* n 10 para 8; *Public Protector I* n 11 para 154.

21. Thus, it has been held that punitive costs orders against public officials are justified if their conduct evinces a gross disregard for their professional responsibilities, or they acted 'inappropriately in an egregious manner'.¹⁶
22. In like vein, other 'officials' or persons who act in a representative capacity, such as trustees, have been considered liable to pay costs *de bonis propriis* where they grossly disregarded their fiduciary or professional responsibilities¹⁷ or acted in 'bad faith or recklessly'.¹⁸ In *Grobbelaar*¹⁹ it was suggested that trustees could be held liable even where they are simply considered to have acted 'improperly' or 'unreasonably'.
23. As far as personal costs orders against legal representatives are concerned, these are similarly also only granted in exceptional circumstances,²⁰ where the practitioner has acted inappropriately in a 'reasonably egregious' (sic) manner.²¹ In this regard there is no 'set threshold' (sic) where an 'exact' standard of conduct will warrant such an order.²² As in the case of public officials, the assessment of the gravity of the conduct is objective, and what constitutes inappropriate or egregious conduct depends on the circumstances of each case- there is no 'closed list' (sic) of such conduct.²³
24. Thus, as in the case of public officials, it has been held that costs orders *de bonis propriis* against legal practitioners are justified where they have acted in circumstances that involve gross disregard of their professional responsibilities or dishonesty,²⁴ or where they have been grossly negligent i.e. negligent 'in a

¹⁶ *Public Protector II* n 14 para 33.

¹⁷ *Snyman v De Kooker NO & Ors* [2024] ZASCA 119; 2024 (6) SA 136 (SCA) para 61, which concerned a failure by a trustee to account for monies received in trust.

¹⁸ *Jooste NO & Ano v Pretorius & Ors* [2024] ZASCA 130; 2025 (3) SA 95 (SCA) paras 60-63, where a trustee brought an *ex parte* application against her co-trustees which was based on falsehoods and which excluded them from participating in the affairs of the trust, and even after the order was rescinded continued to frustrate them from carrying out their duties and functions.

¹⁹ *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725B-C.

²⁰ *Kunene & Ors v Minister of Police* [2021] ZASCA 76 para 49; *Stainbank v SA Apartheid Museum at Freedom Park & Ano* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) para 52.

²¹ *Stainbank*, id.

²² Id.

²³ *Kgoro Consortium (Pty) Ltd & Ano v Cedar Park Properties 39 (Pty) Ltd & Ors* [2022] ZASCA 65 para 18, referring to *Public Protector I* n 11 para 33.

²⁴ *CB & Ano v HB* [2020] ZASCA 178; 2021 (6) SA 332 (SCA) para 21.

serious degree',²⁵ or even where they are grossly incompetent in the discharge of their duties or functions.²⁶

(b) The power to strike material from affidavits

25. Rule 6(15) of the Uniform Rules provides that a court may, on application, order to be struck from 'any affidavit' any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. Scandalous matter is that which is considered abusive or defamatory and vexatious matter is that which conveys an intent to harass or annoy.

An assessment

26. The power of a court to make costs orders is a 'facet' of its control over the proceedings before it and a matter for its discretion, which is to be exercised judicially, with due regard for all relevant considerations, including the nature of the litigation and the conduct of the parties.²⁷
27. And as this discretion is a so-called 'true' or 'strong' one it is not to be easily interfered with on appeal. Thus, an appeal court can only do so where the court *a quo* did not exercise this discretion judicially, in that it was influenced by a wrong principle or a (material) misdirection on the facts or the law, or the decision it made was one which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. An appeal court cannot interfere simply because it thinks the court *a quo* was 'wrong' and it would have awarded costs differently.²⁸
28. As previously pointed out, the appellants contend that the court *a quo* misdirected itself in several respects, principally by ruling on and upholding the application to strike out paragraphs of the supplementary answering affidavit before ruling on whether it should be admitted, and by making a costs order against both of them and their attorney, without joining them to the proceedings.

²⁵ *Id*, referring to *Pheko v Ekurhuleni Metro Municipality (No. 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC) paras 51 and 54; *Stainbank n 20* paras 52-54; *SA Liquor Traders Association & Ors v Chairperson, Gauteng Liquor Board & Ors* [2006] ZACC 7; 2009 (1) SA 565 (CC) para 54.

²⁶ *CB n 24* para 21.

²⁷ *International Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 25.

²⁸ *Public Protector 1 n 11* para 107 (minority) and paras 144-145 (majority); *Florence v Government of the RSA* [2014] ZACC 22; 2014 (6) SA 456 (CC) paras 112-113.

29. As regards the former, the respondents submit that inasmuch as rule 6(15) does not prescribe when an application to strike out must be heard and the high court is constitutionally empowered²⁹ to regulate its own process, it was within its rights to elect to hear and rule on it before the application for the admission of the supplementary answering affidavit. They submit that the court *a quo* correctly remarked³⁰ that it was logical for it to do so as it was necessary for it to determine what the evidence was which the liquidators wished to place before it by way of the supplementary answering affidavit, to ensure that it did not include irrelevant, scandalous or vexatious material. The court *a quo* was therefore correct in dismissing the criticism that the supplementary answering affidavit was not before it at the time when it elected to deal with the striking out application. Consequently, it was open to the court to hear the Bank's striking out application before the liquidators' application for the admission of the supplementary answering affidavit.
- (a) An interpretation of rule 6(15)
30. It is trite that when a court embarks on the process of interpretation of a provision in a statute or a rule of court, it engages in the unitary exercise of having regard for the text i.e. the language used, in its context, and the purpose of the provision in question.³¹ In *Capitec Bank*³² Unterhalter AJA (as he then was) cautioned that this triad of interpretative factors must not be used in a mechanical fashion and it is the relationship between the words used, the concepts expressed by them and the place of the contested provision within the scheme of the statutory piece (in this case the rule), as a whole, that constitutes 'the enterprise by recourse to which a coherent and salient interpretation' is arrived at.
31. The contested provision in this case, rule 6(15), is the last subrule in rule 6 of the Uniform Rules, the rule which deals with applications in the high court. It must therefore be considered in the context of subrules 6(1)-6(14), which

²⁹ Section 173 of the Constitution.

³⁰ Para 9 of the main judgment, as expounded on in para 5 of the judgment on the application for leave to appeal.

³¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

³² *Capitec Bank Holdings Ltd & Ano v Coral Lagoon Investments 194 (Pty) Ltd & Ors* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 25.

precede it, and the rule as a whole, which makes provision for three principal sets of affidavits to be filed in applications: founding, answering and replying affidavits, in terms of subrules 6(1), 6(5)(d)(ii) and 6(5)(e) respectively.

32. The affidavits in motion proceedings fulfil the dual purpose of enabling parties to place their material evidence in support of, or in opposition to, the granting of the relief claimed, before the court, and to define the issues between them.³³ Given this, the founding affidavit must set out the essential averments on which the applicant's case is based, for in the absence thereof the respondent will not know what case it has to meet in its answering affidavit.³⁴ In its answering affidavit the respondent is required to deal pertinently with the material averments which are contained in the founding affidavit. A failure to do so will be constituted as an admission of any averment that has not been denied. In its replying affidavit the applicant has the right to respond to the averments which were made by the respondent. It does not have the right to introduce a new case, different from that which it set out in its founding affidavit.
33. All of this means that it is important for parties to set out their respective cases in the affidavits they are each entitled to file. The format provided for by the rule, and the wording of its various sub-provisions, makes it clear that essentially parties are only entitled to each file a primary affidavit in respect of their respective cases - they do not have the right to simply file as many affidavits as they wish, in order to make their cases as they go along or to keep responding to one another. In this regard the subrule which makes provision for the filing of a replying affidavit, rule 6(5)(e), stipulates that a court may in the exercise of its discretion 'permit' the filing of any 'further' affidavit i.e. an affidavit aside from, or in addition to, the three primary affidavits allowed.
34. In *Sewpersadh*³⁵ it was held that, given the wording of the subrule a party who wishes to file a further affidavit beyond the three provided for cannot 'simply slip' it into the court file, and must make formal application to the court for leave to do so, as they do not have the right to file it and must seek an indulgence in

³³ *Swissborough Diamond Mines (Pty) Ltd & Ors v Government of RSA & Ors* 1999 (2) SA 279 (W) at 323G.

³⁴ *Maes v Hancox* [2003] ZAWCHC 43 para 19.

³⁵ *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153H, approved in *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (4) SA 161 (SCA) at 165A-C.

this regard. If this is not done the court can regard the affidavit as *pro non scripto*.

35. As it is essentially a question of fairness to both parties as to whether to permit a further affidavit, the applicant is required to provide a satisfactory explanation for why the facts or information which are set out therein were not submitted previously, and the court must be satisfied that the admission of the affidavit will not cause prejudice to the other party/parties which cannot be remedied by an appropriate order, including an order granting the other party/parties leave to file further affidavits in response thereto, if merited, and an appropriate order as to costs.³⁶ Other factors relevant to such an exercise include assessing the degree of materiality of the contents of the affidavit and the general need for finality in judicial proceedings.
36. Given 1) the evidentiary and issue-defining purpose which affidavits serve in application proceedings 2) the format adopted by the rule, which envisages the parties' cases to be set out in a logically sequential and sensible manner in three primary affidavits 3) the restriction on the filing of any further affidavits, which can only occur with the court's *imprimatur*, failing which any such affidavits that are lodged are *pro non scripto*; the power to strike out any scandalous, vexatious or irrelevant material 'in any affidavit' can only be a power which may be exercised in respect of an affidavit which is formally part of the record i.e. either one of the three permitted sets of affidavits which may be filed or one that is admitted into the record by the court, in terms of rule 6(5)(e), in the exercise of its discretion.
37. An interpretation that allows for the striking out of material in an affidavit that is still lurking in the wings, waiting for admission, is not sensible or business-like. In this regard it makes no sense, as occurred in this matter, to hear and grant an application to strike out certain paragraphs in an affidavit when, immediately thereafter, the entire affidavit may be ruled inadmissible. Not only is this logically non-sequential and an inefficient use of judicial resources but also results in the unnecessary making of costs orders against a party, by potentially subjecting it to the 'double whammy' of costs in respect of both the striking out and the rule 6(5)(e) application. The further anomaly which arose in this matter as a result

³⁶ Erasmus: Superior Court Practice RS 27 (2025) D1 rule 6-31/32.

of the approach which was followed by the court a *quo* was that even though it upheld the rule 6(15) application and struck out the offensive paragraphs in the supplementary answering affidavit and thereafter ruled that the entire affidavit was not to be admitted, when determining the liability for costs of the rule 6(5)(e) application it held that it needed to have regard for the entire affidavit, as it was in its unexpurgated state, when it was lodged. In my view this was a further material misdirection.³⁷

38. Before concluding on this aspect it is necessary to note that rule 6(11) stipulates that, notwithstanding the subrules which precede it, interlocutory and other applications incidental to pending proceedings may be brought on notice, supported by 'such affidavits as the case may require', and rule 6(12) provides that in urgent applications the court may dispense with the forms and service provided for in the rules and may dispose of such applications at such time and in such manner, as it deems fit. Notably however, the subrule goes on to stipulate that the procedure which is to be adopted shall, as far as is practicable, be 'in terms of the rules' i.e. shall follow the format adopted by them. In my view, given their wording the subrules therefore do not detract from the principle that is at issue viz that an application to strike material from an affidavit can only be entertained if, and when, the affidavit is properly before the court.
39. Invariably, applications that are brought in terms of either one of these subrules follow the same format which applies in ordinary applications i.e. a founding/supporting affidavit is lodged, in response to which, if the application is opposed, an answering affidavit is filed, followed by a replying affidavit, if necessary.
40. The fact that an application is an interlocutory or incidental one, or one that is brought as a matter of urgency, does not mean that any party to it can simply file any number of affidavits in support of, or in answer to it, and It has always been understood that the format of such applications is the same as that which applies in ordinary applications, and the parties are thus similarly confined to filing the three sets of affidavits allowed for in any ordinary, non-urgent application.

³⁷ Vide *Selective Empowerment Investments Ltd v Companies & Intellectual Property Commission* [2025] ZASCA 71; [2025] 3 All SA 365 (SCA) paras 114-115.

41. In the circumstances, although there is no rule 6(5)(e) bar to any 'further' affidavit being filed in relation to an application that is brought in terms of either rule 6(11) or 6(12), it has always been understood that the filing of any affidavit in such application, beyond or further to the three which are allowed for in ordinary applications, can only occur with the leave of the court. And until such leave has been obtained an application to strike out scandalous, vexatious or irrelevant material from such affidavit cannot be entertained.

(b) The issue of non-joinder

42. I now turn to the complaint of non-joinder. It lies at the intersection of two principles which are sometimes confused or intermingled with one another viz the right to a fair hearing which, it has been held, lies at the heart of the rule of law, and which, as one of its features postulates that no-one should be 'condemned' (sic) to an order being made against them without being afforded an opportunity to state their case i.e. *audi alteram partem*,³⁸ and the principle that persons who have a 'direct and substantial interest' in a matter (or an order that is sought in it), should be joined as parties to it.³⁹ In *Umndeni (Class) of Amantungwa*⁴⁰ it was pointed out that joinder does not depend on the nature of the subject matter of the proceedings before a court, but rather on the manner and the extent to which the court's order may affect the interests of 3rd parties.
43. By way of an illustration of the point, in *Snyders*⁴¹ (which was recently referred to by the SCA in *Hlatshwayo*⁴²), the CC restated the principle that a person has a 'direct and substantial' interest in an order that is sought if it would directly affect their rights or interests, in which case they should be joined to the proceedings, and then went on to hold that, if they are not, the judgment will have been given without affording them an opportunity to be heard. This is

³⁸ *De Beer N.O v North-Central Local Council & South-Central Local Council* [2001] ZACC 9; 2002 (1) SA 429 (CC) para 11.

³⁹ Rule 10 of the Uniform Rules, which sets out the requirements of when and how joinder takes place in the high court. In *Occupiers of Erf 101 & Other Erven, Shorts Retreat Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & Ors* [2009] ZASCA 80; 2010 (4) BCLR 355 (SCA) para 12, it was held that at common law courts have the inherent power to order joinder when it is necessary.

⁴⁰ *Umndeni (Class) of Amantungwa & Ors v MEC for Housing & Traditional Affairs, KwaZulu-Natal & Ano* [2010] ZASCA 142; [2011] 2 All SA 548 (SCA) para 38.

⁴¹ *Snyders & Ors v De Jager & Ors* [2016] ZACC 54; 2017 (5) BCLR 606 (CC) para 9.

⁴² *Road Accident Fund & Ors v Hlatshwayo & Ors* [2025] ZASCA 17; [2025] 2 All SA 333, In which *de bonis propriis* costs orders which were made against the CEO and Board of the Road Accident Fund, were set aside on appeal.

indeed so, but the two principles must nonetheless be distinguished from one another.⁴³ If one does not do so, one risks confusing the requirements for the two and wrongly holding that in order that they may have an opportunity to be heard a person *must* be joined as a party to a suit.

44. The appellants contend that as the *de bonis propriis* orders that were granted clearly affected their pockets and thus their personal interests directly, they had the necessary 'interest' required for joinder. They point out that in *Black Sash II* and *Ex parte Minister of Home Affairs*, persons who were before the court as parties in a representative and official capacity, to wit Ministers and Directors-General of the Departments of Social Development and Home Affairs, were called upon to show cause why they should not be joined and were thereafter formally joined personally to the proceedings, before *de bonis propriis* costs orders were made against them. Consequently, as they were also before the court in their representative and official capacities as liquidators they too should have been joined in their personal capacities, and in not doing so the court erred and the costs orders made against them cannot stand.
45. In contrast to the broad test for joinder which was set out in *Snyders* i.e. simply whether an order which is sought would affect the rights or 'interests' of a 3rd party, it has consistently been held ⁴⁴ that a 3rd party's 'interest' must be a 'legal' one i.e. legally cognizable, before that party can and should be joined, and not any interest will do. Thus, a mere 'financial' interest in a matter, which is indirect or incidental to it, may not justify joinder.⁴⁵
46. Furthermore, in refinement of the 'interest' requirement it has been held that it is only in instances where the order or judgment which is to be made against a party cannot be 'sustained' without necessarily prejudicing the interests of 3rd parties i.e. non-parties, that they have the necessary 'legal interest' which requires or allows them to be joined.⁴⁶ This may mean that only a person who has a direct and substantial interest in the result of the decision to be made i.e.

⁴³ In *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para 9 the SCA distinguished the *audi alteram partem* principle as it was developed in the case law in terms of the doctrine of legitimate expectation (as per *Du Preez and Traub*) and joinder.

⁴⁴ Vide the long list of cases set out by *Erasmus* n 36 at Rule 10-3, which sets out the commentary on the principles of joinder, misjoinder and non-joinder at common-law and in terms of rule 10 of the Uniform Rules.

⁴⁵ *Standard Bank of SA v Swartland Municipality* 2011 (5) SA 257 (SCA) at 259G-H.

⁴⁶ *Gordon* n 43 paras 9-10.

the outcome of an application,⁴⁷ and not simply in an aspect incidental to it, has the necessary standing to be joined to the proceedings.

47. A cogent example of the application of these interrelated principles can be found in *Gordon*,⁴⁸ where the SCA held that the LAC had erred in non-suited an applicant on the grounds of non-joinder, who had unsuccessfully approached the Labour Court for an order of 'protective promotion',⁴⁹ in an application in which he claimed that he had been unfairly discriminated against on the grounds of race, in that, although he had been considered to be the most suitable candidate for a post at a hospital, it was awarded to another candidate. The SCA held⁵⁰ that as the order which was sought was not one setting aside the award of the post to the other candidate, he (i.e. the successful candidate) did not have the necessary direct and substantial 'interest' to be joined in the proceedings, and the applicant's failure to do so should not have non-suited him. This case vividly illustrates the point that, when considering whether joinder is required the relief which is sought on the merits of the dispute is relevant.

48. If one applies these principles to the facts in this matter it seems to me that the direct and substantial interest which the 1st and 2nd appellants had in the proceedings before the court *a quo* was their interest, in their representative capacities as liquidators, in having their supplementary answering affidavit admitted on behalf of the 8th respondent, in opposition to the case which had been put up by the Bank. It is only when the issue of their conduct was raised, as possibly meriting a personal costs order against them, that they developed a secondary, personal interest in the matter, and it was one in relation to such order, and not one in relation to the principal relief sought or the outcome of the main application. Put differently, that interest was not one that related directly to the subject-matter of the main application and the order which was sought in that regard i.e. the setting aside of the ss 417-48 proceedings. And any order which eventually was to be granted in relation to such relief in the principal application, could clearly be sustained and given effect to, without affecting or

⁴⁷ *Collin v Toffie* 1944 AD 456 at 464, referred to in *Standard Bank* n 44, id.

⁴⁸ Note 43.

⁴⁹ As defined in the Public Service Commission's Staff Code.

⁵⁰ Para 10.

prejudicing the appellants' personal interests, irrespective of any personal costs order which was made against them. Their personal interest in the *de bonis propriis* costs order which was sought against them as a result of the upholding of the striking out application and the dismissal of the application for the admission of the supplementary answering affidavit (because of the personal attack they had launched against the Bank's legal representatives and their improper attempt to introduce a large volume of irrelevant material into the application), was simply a financial interest which was incidental to the primary interest they had in the outcome of the application.

49. Consequently, in my view there was accordingly no need for them to be joined, in their personal capacity, in the proceedings. All that was required, in order to give effect to their right to a fair hearing was for them to be afforded an opportunity to be heard in regard to why such a costs order should not be made against them. And it is common cause that they were given such an opportunity and in using it they made extensive submissions to the court *a quo*.
50. As for the decisions in *Black Sash II* and *Ex parte Minister of Home Affairs*, whilst it is so that the CC made orders in these matters joining persons who were acting in a representative capacity, to the proceedings in their personal capacity, in my view on a careful reading of the *ratio* of these cases in doing so the CC was in actual fact giving effect to the *audi alteram partem* principle and not the common law or rule-bound principles of joinder, nor did it set out a new requirement for compulsory joinder which applies to persons who act in a representative capacity.⁵¹
51. In *Black Sash II* the question for decision⁵² was whether our law allowed for a state official to be personally joined as a party in a matter involving the performance of official duties and whether they could be personally mulcted in costs. Froneman J held,⁵³ for the Court, that where the possibility of a personal costs order against a state official exists, he/she must be made aware of the risk and should be given an opportunity to advance reasons why the order

⁵¹ And in referring to the dictum in *Snyders* n 41 para 9, in its recent decision in *Hlatshwayo* n 42 para 29 the SCA was, in my view, also primarily giving effect to and upholding the *audi alteram partem* principle, when it concluded (at para 31) that the CEO and Board of the RAF had not been given a proper opportunity to be heard before a *de bonis propriis* costs order was made against them.

⁵² Para 3.

⁵³ Para 4.

should not be granted and, to this end, joining them as a formal party to the proceedings was 'one way' and 'the safest', to achieve this. In support of this dictum Froneman J made reference in a footnote⁵⁴ to a series of earlier decisions, including *Pheko*,⁵⁵ (where an executive mayor and municipal manager were joined to the proceedings for the purpose of implementing a supervisory order and their attorney was not joined but ordered to pay 50% of the costs of suit *de bonis propriis* because of his gross disregard for his professional responsibilities) and *Lushaba*,⁵⁶ in which costs orders *de bonis propriis* against certain officials of the provincial department of health were set aside on the basis that they had not been given an opportunity to make representations and had therefore been 'condemned' without a hearing i.e. without being afforded *audi alteram partem*. In *Ex parte Minister of Home Affairs* the relevant Minister and Director-General were called upon to show cause why they should not be joined and why they should not be ordered to pay the costs of the application out of their own pockets in their personal capacity, and were then joined to the proceedings, 'in accordance'⁵⁷ with the procedure which had been adopted in *Black Sash II*, and in doing so the CC again referenced the decision in *Lushaba*.⁵⁸ So in this instance too, as I see it, the 'joinder' was effected in order to give the relevant functionaries *audi* i.e. an opportunity to be heard in relation to the making of a possible costs order against them.

52. That then as far as non-joinder of the liquidator appellants is concerned. As for the non-joinder of their attorney, as far as I am aware it has never been held to be necessary for any legal representative who has acted for a party in a matter to be joined to the proceedings, before costs orders *de bonis propriis* can be made against them. As far as such orders have been made by the CC in matters I have already referred to, in *Pheko* (2016) whilst reference was made to the need to join the executive mayor and municipal manager for the purpose of implementing supervisory orders, the Court did not state that this was necessary in order for it to make a *de bonis propriis* costs order against their attorney. Likewise, in *Ex parte Minister of Home Affairs* (2023) where the

⁵⁴ Id, fn 2.

⁵⁵ *Pheko* n 25 paras 14-15, 54.

⁵⁶ *MEC for Health, Gauteng v Lushaba* [2016] ZACC 16; 2017 (1) SA 106 (CC) paras 18-19.

⁵⁷ *Ex parte Minister of Home Affairs* n 9 para 70.

⁵⁸ Id, fn 51.

Minister and Director-General were ordered to pay 10% and 25% respectively of the costs *de bonis propriis* after being formally joined to the proceedings, their legal representatives, who were severely criticised for their conduct in the litigation and who were disallowed their fees in *toto* as a result of their 'abysmal' failure to represent their clients in the professional manner required, were not joined. The procedure followed in these cases was that prior to such an order being made the legal representatives were afforded the opportunity to tender affidavits and/or to make submissions, if they so wished, as to why they should not be held responsible for and mulcted personally in costs, in accordance with the procedure which was followed by the CC in 2006, in *SA Liquor Traders' Association*.⁵⁹

53. The same approach was adopted by the SCA in its decisions in *CB* (2020),⁶⁰ *Chithi* (2021),⁶¹ and *Kgoro Consortium* (2022),⁶² where it set aside *de bonis propriis* costs orders which were made by lower courts against attorneys, on the grounds that they had not been given a fair and proper opportunity to state their case and to say why such orders should not be made against them, and not on the basis that they had not been joined to the proceedings; and in *Takubiga Trading* (2022),⁶³ where it made an order depriving the appellant's attorneys of their fees on appeal, after giving them such an opportunity, without joining them.
54. The appellants contend that the joinder of a legal representative who has acted for a party is necessary because, without it, they have no *locus standi* to lodge an appeal against a costs order which may be made against them. Whilst it is so that, ordinarily, a person who was not a party to proceedings before a court will not have the necessary standing to appeal the outcome thereof, it has been steadfastly accepted without demur by the SCA⁶⁴ that attorneys or advocates who represented parties and against whom *de bonis propriis* costs orders have been made, have the right not only to apply to the court which made the order

⁵⁹ Note 25.

⁶⁰ Note 24 para 20.

⁶¹ *Chithi & Ors; In re: Luh!winj Mchunu Community v Hancock & Ors* [2021] SCA 123 para 14.

⁶² *Kgoro Consortium* n 23 para 19.

⁶³ *City of Ekurhuleni Metropolitan Municipality v Takubiga Trading & Projects CC & Ors* [2022] SCA 82; 2023 (1) SA 44 (SCA).

⁶⁴ See for example *Chithi* n 61 where the advocate and attorney who acted for a party applied for leave to appeal a *de bonis propriis* costs order which had been made against them.

- for leave to appeal it, or to the SCA, as the case may be, but also have the right to appear before the appellate court in their own name, as appellants on appeal.
55. In the circumstances, given my earlier finding that the joinders that were effected in *Black Sash II* and *Ex parte Minister of Home Affairs* (which have now become *de rigueur* in matters where personal costs orders are sought against state officials who are parties to a suit in their representative and official capacity), did not introduce a new form of compulsory, personal joinder of parties who act in a representative capacity, and given that it has always been accepted that in the exercise of their inherent (and now constitutional) power to control the proceedings before them, courts may discipline errant practitioners by way of personal costs orders, there is no cause or warrant to introduce a requirement that legal practitioners who act in suits before courts must be joined, before such orders may be made against them. Doing so would in any event be untenable and impractical, and would result in additional, unnecessary expense and delay in the expeditious resolution of disputes.

(c) The costs order against 2nd appellant.

56. The last ground of appeal which must be dealt with is the contention that a costs order against the 2nd appellant *de bonis propriis* was not justified. In this regard the appellant's counsel submitted that, at worst, she had made an error of judgment and was not guilty of engaging in a vexatious frolic, as might be said of her co-liquidator, the 1st appellant, who deposed to the supplementary answering affidavit.
57. In discharging their duties liquidators are required to exhibit a high standard of care and diligence.⁶⁵ In carrying out the function of winding up companies they occupy a position of trust i.e. they bear a fiduciary responsibility, not only towards creditors but also towards the companies in liquidation, the assets of which vest in them.⁶⁶ In the discharge of this function they surely have the duty to ensure that they do not engage in frivolous or ill-conceived litigation on behalf of the companies, thereby exposing their insolvent estates to unnecessary risk

⁶⁵ *Henochsberg* on s 371 of the Companies Act 61 of 1973, (5th Ed) at APPI-210, referring to *Concorde Leasing Corp (Rhodesia) Ltd v Prinigle-Woods N.O.* 1975 (4) SA 231 (R) at 234-235.

⁶⁶ *Henochsberg* id APPI-209.

- and attendant costs and expense. Because of this, liquidators have been held liable in damages where they negligently failed to discharge their duties.⁶⁷
58. Whilst it is so that 1st appellant deposed to the supplementary affidavit and, in doing so, made offensive allegations against the Bank's legal representatives, in my view this does not serve to absolve the 2nd appellant from her responsibilities. As the respondents point out, the application for the admission of the supplementary affidavit was one brought by the 1st appellant, on behalf of himself and the 2nd appellant, as joint, co-liquidators of the 8th respondent. As such, she had the duty to ensure that it was an application that was properly brought and that it did not expose the 8th respondent's estate to the possibility of an unnecessary and punitive costs order. In deposing to a confirmatory affidavit 2nd appellant was not only confirming that the contents of the supplementary answering affidavit were true and correct insofar as they pertained to her, but, insofar as she had delegated the power to launch the application for the admission of the affidavit to the 1st appellant, she was required to ensure that it was not misused by him, to the possible detriment of the 8th respondent's estate. If she read the affidavit, as she must have, given that she confirmed its contents insofar as they pertained to her, she would have seen that it contained a vituperative and unwarranted personal attack on the Bank's legal representatives, on the grounds of an opinion which 1st appellant had received from the Bank's senior counsel in another matter, which opinion was attached, and which on a cursory reading thereof would have revealed that it could not possibly serve as the basis for the accusations which 1st appellant made.
59. She would also have seen that the 1st appellant sought to attach and incorporate the entire 3000 plus page record of the ss 417-418 proceedings, into and as part of the principal application, without identifying, let alone indicating, which portions thereof were relevant to it, as is required. Any reasonable and prudent liquidator in her position would have realized that the application was therefore irregular and potentially exposed the 8th respondent's

⁶⁷ Vide the cases cited in *Henochoberg* id. For the distinction between the breach of their fiduciary duty, which has at its core, the obligations of fidelity and loyalty, and the breach of their statutory duties as liquidators see *Master of the High Court, Western Cape Division v Van Zyl* [2019] ZAWCHC 23; [2019] 2 All SA 442 (WCC) para 108 and *Phillips v Fieldstone Africa (Pty) Ltd & Ano* [2003] ZASCA 137; [2004] 1 All SA 150 (SCA) paras 27-34.

estate to an adverse costs order as it was comprised of scandalous, vexatious and wholly irrelevant material, and would not have gone along with it, at least not in the form it was in. No explanation was provided in the court a *quo*, or before us on appeal, for why, given these circumstances, the 2nd appellant did not intervene and attempt to persuade the 2nd appellant not to proceed with the application or why she deposed to a confirmatory affidavit for it, thereby going along with it. In my view, the 2nd appellant failed to do what was expected of her, in disregard of her professional responsibilities, and was grossly negligent. In the circumstances I see no reason to interfere with the *de bonis propriis* order that was made against her.

Conclusion

60. At the time when they filed their notice of appeal 1st and 2nd appellants accepted that the application for the admission of the supplementary answering affidavit had been correctly dismissed, a concession which was repeated by their counsel in argument before us. All they sought on appeal was an order that the costs of the application be borne by them *nomine officio* i.e. by the 8th respondent's insolvent estate and not by them personally *de bonis propriis*.
61. Given the conclusions I arrived at in relation to the complaint of non-joinder and that in relation to the 2nd appellant, and given the appellants' effective concession that the court a *quo* correctly held that the supplementary affidavit had not only been tendered extremely late, without a satisfactory explanation, but its contents were also both scandalous and vexatious as well as wholly irrelevant, a costs order *de bonis propriis* was clearly warranted. The appeal must accordingly fail in respect of para (d) of the order which was made by the court a *quo*.
62. That in such circumstances the appellants saw fit nonetheless to include the entire record of the proceedings before the court a *quo*, including all 3000 plus pages of the ss 417-418 enquiry, as part of the appeal record, constitutes an abuse of process which is deserving of censure by way of an appropriate deprivation of fees.⁶⁸ In this regard only the two volumes that were put before us for the purpose of argument, which contained the two interlocutories (excluding the ss 417-418 record) and the judgments of the court a *quo*, which

⁶⁸ For precedent in this regard vide *Takubiga* n 63 and *Ex parte Minister of Home Affairs* n 9.

together comprised some 150 pages, were relevant. In my view, in the circumstances it would not be fair or appropriate to allow the appellants' legal representatives to recover more than 10% of their fees in respect of the appeal record, from the 8th respondent.

63. As far as para (b) of the order is concerned, whereby the Bank's application to strike out was upheld, as pointed out I am of the view that the court *a quo* erred and misdirected itself in granting it. Given that the supplementary answering affidavit was ruled to be inadmissible, it did not form part of the record, and consequently the order striking out parts of it should not have been made and cannot stand. Although this application should have been dismissed, I am of the view that the Bank acted appropriately and prudently in filing it, so that if the application for the admission of the supplementary answering affidavit had not failed, those portions of it that were scandalous and vexatious could be struck from it. In the circumstances, in my view the fair and appropriate order to have made as far as the costs of this application were concerned was that the parties were each to be responsible for their own.
64. Finally, given that both parties have achieved a measure of success in the appeal, save for what is set out in the preceding paragraphs as to costs there should accordingly be no order made as to the costs of the appeal.
65. In the result I would make the following order:
 1. Save to the extent set out in paragraphs 2 and 3 below the appeal is dismissed, with no order as to costs.
 2. Paragraph (b) of the order which was made by the court *a quo* in its judgment of 16 November 2023 is set aside and replaced with the following:

'(b). The applicants' application to strike out the paragraphs or parts thereof listed in paragraph 2 of the notice of motion dated 6 November 2023 is dismissed, with no order as to costs.'
 3. The appellants' legal representatives shall be entitled to charge or recover from the estate of the eighth respondent (in liquidation) no more than 10% of the fees incurred in relation to the copying, preparation and perusal of the appeal record.



M SHER

Judge of the High Court

I agree.



N ERASMUS

Judge of the High Court

I agree, and it is so ordered.



N RALARALA

Judge of the High Court

Appearances:

Appellants' counsel: RS Van Riet SC
 Appellants' attorneys: Lombard & Kriek (Belville)
 Respondents' counsel: W Luderitz SC
 Respondents' attorneys: Fluxmans Attorneys (Johannesburg)