IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A140/2024

Date of hearing: 18 February 2026

Date delivered: 5 March 2026

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) ~~REVISED~~

5/3/26 [redacted]
DATE SIGNATURE

In the application between:

COMPANY UNIQUE FINANCE (PTY) LTD	**Appellant**
and	
RESIDUAL DEBT SERVICES LTD	**First Respondent**
THE CHIEF REGISTAR OF DEEDS	**Second Respondent**
THE PRUDENTIAL AUTHORITY	**Third Respondent**
THE MINISTER OF FINANCE	**Fourth Respondent**

JUDGMENT

SWANEPOEL J:

Introduction

[1] This is an appeal against an order granted by Barit AJ on 20 January 2023. The appeal is with the leave of the court *a quo*. in the following terms (I summarize):

[1.1] The arbitration appeal award granted on 22 December 2020 was made an order of court;

[1.2] Furthermore, it was declared that:

[1.2.1] Specific immovable properties (as listed in Annexures FA 22.1 to 22.8 of the founding affidavit) were transferred from the first respondent ("RDS") to the appellant ("CUF") on 25 October 2004, by virtue of the provisions of section 54 of the Banks Act, 94 of 1990 ("the Act");

[1.2.2] The rights and obligations of RDS as mortgagee in respect of the mortgage bonds listed in Annexures FA 23.1 to 23.3 were transferred from RDS to CUF in terms of section 54 of the Act on 25 October 2004;

[1.2.3] In addition to the properties and mortgage bonds listed in annexures FA 22 and 23, any further rights and obligations of RDS arising from any immovable properties and mortgage bonds registered in any Deeds Office in South Africa were transferred to CUF in terms of section 54 of the Act on 25 October 2004;

[1.3] The second respondent was ordered to cause the title deeds of the immovable properties listed in Annexures FA 22 and 23, and any other that remained registered in the name of the applicant to be endorsed to reflect that the properties and the obligations arising from the mortgage bonds had been transferred from RDS to CUF on 25 October 2004;

[1.4] CUF must pay the costs of the application.

Background

[2] RDS is the erstwhile The African Bank Ltd ("the Bank" or "RDS"), having been renamed on 4 April 2016. The dispute between these parties has its origin in the financial woes experienced by the Bank in the early to mid 1990's, resulting in it being placed under curatorship in 1995. During 1998 Theta Group Ltd ("Theta") acquired 100% of the shares in the Bank. Theta's main aim was to retain the Bank's banking licence, whilst simultaneously relinquishing all risk in the Bank's debtors' book. The Government accepted liability for a portion of the debtors' book, which became known as the "Government" book. During 1998 an agreement ("the 1998 agreement") was entered into between Theta and the Bank's shareholders which incorporated these terms.

[3] In terms of the 1998 agreement the Bank's debtors' book was ring-fenced within the Bank. The "ring-fenced business" was then described as:

> "1.32.1 all assets and all contracts and securities and general and specific provisions relating to the debtors' book;...
>
> 1.32.3 all income and expenses relating to the running and liquidating of the debtors' book;...
>
> 1.32.6 the management of and all risks and benefits relating to the Government book; and..."

[4] The Government book was defined in the 1998 agreement as:

> "the loans and advances of the [Bank] for which the Government has assumed responsibility (including all concomitant liabilities and undertakings in respect of such book); and..."

[5] A further share agreement was entered into in 1999, but I do not believe that it is relevant to this judgment. Subsequent to the parties entering into the 1998 agreement, CUF was appointed to manage the ring-fenced business through its division, Loan Management Services.

[6] On 20 November 2003 the sellers in the 1998 transaction (also known as "the Consortium") entered into a third agreement ("the 2003 agreement") with various parties, including CUF, in terms of which CUF acquired the ring-fenced business from the Bank. The transaction

resulted in the Bank disposing of a major part of its assets. The transaction was subject to the condition precedent that the Minister of Finance approve of the transaction in terms of section 54 of the Banks Act, 94 of 1990. On 2 December 2003 the Bank submitted an application in terms of section 54 to the Minister. The final condition precedent was fulfilled on 25 October 2004, which then became the effective date.

[7] The Government book became the subject of a dispute between the parties. CUF took the stance that the Government book was not included in the ring-fenced business. RDS took the opposite view. The cause of the dispute lies in the fact that the Government book comprises of a large number of immovable properties that have, over time, attracted substantial liabilities which CUF does not wish to assume.

[8] The specific terms of the 2003 agreement are not strictly relevant to this judgment, as the interpretation of what was meant by the 'ring-fenced business' has been determined on arbitration, as I explain hereunder. Suffice it to state that the agreement provided for the transfer of the ring-fenced business from the Bank to CUF. The crux of the agreement is in clause 5:

> "5.1 Subject to Clause 8.3, with effect on the effective date, African Bank shall be deemed to have ceded and transferred all its right, title and interest in and delegated all its obligations in respect of the ring-fenced business to [CUF];....

[9] The ring-fenced business was defined as:

"1.20 the business of running and liquidating the debtors' book, which comprises, inter alia;-

1.20.1 all assets and all the contracts and securities relating to the debtors' book, including, but not limited to, mortgage bonds, suretyships, collateral security and insurance policies (including all long-term and short-term policies) securing the debtors' book and any other assets forming part of the ring-fenced business, properties in possession arising out of security held in the debtors' book and leases associated with the debtors' book;...

1.20.6 the management of and all risks and benefits relating to the Government Book; and...

including the extension of such business in the manner referred to in Clause 2.4 of this agreement and all and any business conducted by the managers of the ring-fenced business or LMS in respect thereof, whether before or after the implementation date."

The arbitration

[10] The parties continued to disagree on whether the Government book properties were included in the ring-fenced business, resulting in RDS referring the matter to arbitration in accordance with an arbitration clause in the 2003 agreement. In the arbitration RDS sought the following material relief:

[10.1] An award declaring that the ring-fenced business acquired by CUF in terms of the 2003 agreement comprised of the entire mortgage and asset-based lending business conducted within the Bank, including the Government Book;

[10.2] An award that CUF must take transfer, at its cost, of all properties and securities that form part of the ring-fenced business.

[11] RDS essentially claimed for specific performance of the 2003 agreement; namely, that CUF should take transfer of all of the immovable properties, including those related to the Government Book. CUF denied the RDS' interpretation of the agreement, and also raised a plea of prescription, contending that the claim for specific performance had become prescribed.

[12] On 5 October 2020 the arbitrator (Nugent J) held that the various agreements, but especially the 2003 agreement, clearly distinguished between the debtors' book and the Government Book, and that the latter was not included in the ring-fenced business. Having made that finding, the arbitrator did not consider the prescription plea. As a result, the claim was dismissed.

[13] RDS then referred to matter to appeal before an arbitration appeal tribunal. The appeal tribunal disagreed with the arbitrator on the interpretation of the agreements. It said that:

"It seems to us that the governing effect of clause 5 of the 2003 agreement, which the Arbitrator rightly characterized as its "core", was to transfer the Bank's entire interest in the ring-fenced business to CUF. Without derogating from the general operative import of this provision, clause 5.2 specifically includes 'the debtor's book' in what is transferred. In our view, the Agreement, and its 1998 predecessor ('the main agreement'), mean to include, and do include, within the 'debtor's book' the entirety of the debts owed to the Bank."

[14] That finding required the arbitration appeal tribunal to consider the prescription plea. It said the following:

"This conclusion makes it necessary for us to consider CUF's plea of prescription. We see no answer to it. It is plain that RDS' Prayer 2, an order 'directing that CUF take transfer at its cost…., of all properties and securities that formed part of the ring-fenced business' is an order for the specific performance of the contract and entailed enforcement of a debt…"

[15] Although the operation of section 54 of the Act was canvassed obliquely before the arbitrator and the appeal tribunal, it was not an aspect that either was required to decide upon. The tribunal said the following in respect of the declaratory order:

"[The respondent] contended that it was nevertheless entitled to the declaratory it sought in Prayer 1, which the Arbitrator refused to grant, and whose grant CUF, on the differing interpretation of the pertinent agreements, had resisted all along. It contended, further, that attaining this relief would represent substantial success for it on appeal.

We agree. The claim is based on the admitted allegations in RDS' Statement of Claim read with section 54 of the Banks Act. That claim is not one for a debt, and RDS' replication to CUF's special plea accordingly covers the issue, albeit obliquely. RDS persuasively suggested, though it is not necessary for us to decide this point, that, with Prayer 1 in hand, it could persuade the Registrar of Deeds to endorse the title deeds in issue, thus achieving, without registration what it has sought all along, namely that CUF take responsibility for what it agreed to undertake in the 2003 agreement."

[16] The appeal tribunal, consequently, granted the declaratory order sought by RDS, but dismissed the claim for transfer of the properties.

Application before the Court a quo

[17] Notwithstanding the findings of the appeal tribunal, CUF refused to allow the title deeds of the properties to be endorsed to reflect its ownership of the properties. As a result, RDS brought the aforementioned application before Barit AJ. It sought an order (in summary) that:

[17.1] the arbitration award be made an order of court;

[17.2] a declaratory order be granted that the properties listed in annexures "FA 22.1 to 22.8 were transferred to CUF on 25 October 2004 by operation of law in accordance with the provisions of section 54 of the Act;

[17.3] a declaratory order be granted that all the rights and obligations of RDS as mortgagee in the mortgage bonds listed in annexures "FA 23.1 to 23.3 were transferred to CUF on 25 October 2004 by operation of law in accordance with section 54;

[17.4] a declaratory order be granted that in addition to the properties and mortgage bonds listed in annexures FA 22 and 23, all other properties registered in RDS' name, and the rights and obligations of RDS as mortgagee in any Deeds Office on 25 October 2004 were transferred to CUF on that date, by operation of section 54;

[17.5] the Registrar of Deeds be directed to endorse all title deeds of the properties listed in annexures FA 22 and 23, as well as all other properties that remain in the name of RDS, in order to reflect the transfer of the properties, and the rights and obligations under the mortgage bonds, to CUF on 25 October 2004.

[18] Having heard the matter, Barit AJ granted the order set out in paragraph 1 above. It is against that order that the appeal lies.

[19] In the court a quo RDS argued that CUF had become owner of the properties, and holder of the rights and responsibilities as mortgagee, by operation of section 54 of the Act on 25 October 2004. Section 54 relates to the amalgamation of banks, and, as in this case, the transfer of assets and liabilities of a bank to another bank or to another person. The following subsections of section 54 are relevant:

"(1) The Minister must consent, in writing, and conveyed through the Authority, to-

(a) an amalgamation, merger or arrangement referred to in Chapter 5 of the Companies Act and which involves a bank as one of the principal parties to the relevant transaction; and

(b) an arrangement for the transfer of more than 25% of the assets, liabilities, or assets and liabilities of a bank to another person...

(2) The Minister shall not grant his or her consent referred to in subsection (1) unless-

(a)......

(b).....

(c) in the case of a transfer of assets, liabilities or assets and liabilities referred to in subsection (1) such transfer is effected to another bank or to a person approved by the Authority for the purpose of said transfer.

(3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in subsection (2) (b) or effecting the transfer of such part of the assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B) of one bank to another bank or person as contemplated in subsection (2) (c) or (2A) (c)-

(a) all the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B), respectively, those assets, liabilities, or assets and liabilities of the transferor bank that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities;...

(8) .....every officer or person in charge of a deeds registries or any other office, if, ...

(a)...there is registered any title to property belonging to, or any bond or other right in favour of;...

any bank which has amalgamated with any other bank, or any bank which has transferred all or part of its assets, liabilities or assets and liabilities referred to in subsection (1) or (1B) to any other bank or person shall, if satisfied-

(i) that the Minister has consented in terms of subsection (1) to the amalgamation or transfer or that the Authority has consented in terms of subsection (1B) to the transfer; and

(ii) that such amalgamation or transfer has been duly effected;

and upon production to such....officer or person of any relevant deed......make such endorsements thereon... as may be necessary to record the transfer of the relevant property, bond or other right… to the bank or person that has taken transfer of the said assets, liabilities or assets and liabilities in question."

[20] On an interpretation of section 54(8) of the act, it places a statutory duty on Second Respondent to endorse all such title deeds under its control or placed before it to record the transfer of ownership of affected properties, once Second Respondent is satisfied that the requirements of section 54 (10) of the act have been complied with.

[21] RDS contends before us that ownership of the properties vested in CUF by operation of law from the date upon which the final condition precedent was fulfilled, including approval for the transfer by the Minister, namely 25 October 2004. It says that the application was aimed at obtaining a declaratory order to that effect, and at securing the endorsement by the Registrar of Deeds on the title deeds of the legal fait accompli.

[22] CUF submits the following:

[22.1] That RDS seeks to impose a substantial financial obligation on CUF, in that CUF would become responsible for the liabilities associated with the immovable properties, and that these liabilities constitute a debt in terms of the Prescription Act, 68 of 1969 ("the Prescription Act") which has become prescribed.

[22.2] That CUF would be required to take certain steps to secure the endorsement of the title deeds, which also constitute a debt, and which has become prescribed.

[22.3] That, to the extent that the Court a quo held that obligations were imposed on CUF by virtue of its "special contractual arrangements" with the respondent, it should have concluded that those obligations are a debt in terms of the Prescription Act that had prescribed;

[22.4] That the relief sought in the arbitration and in the court a quo was for specific performance in terms of the 2003 agreement, and to the extent that it had already been held by the Appeal Tribunal that the contractual claim had prescribed, the Court a quo was bound by that finding and was not entitled to make an order for the endorsement of the title deeds.

[22.5] The application of section 54 (3) of the Banks Act was ventilated at the arbitration. Having considered the operation of the Banks Act, the Appeal Tribunal concluded that the claim had prescribed, and that it was, therefore, no longer open to RDS to seek to pursue the operation of section 54 of the Banks Act as a new cause of action.

[22.6] The 'Henderson principle'[1] requires a party to raise all matters concerning its case in the same proceedings, and that it is an abuse of process to raise in later proceedings such matter as should have been raised before. As RDS had not raised the section 54 claim in the arbitration, it was not open for it to raise it in the application.

[23] Three main themes in CUF's case have to be explored. Firstly, what is the exact nature of RDS' claim in the application, and is it a contractual claim as CUF argues? Secondly, has RDS' claim prescribed? Thirdly, is RDS entitled to now seek an order in terms of section 54 of the Act, considering it did not do so in the arbitration, or is it barred from doing so by the Henderson principle?

The nature of RDS' claim

[24] RDS' claim in the arbitration was clearly couched as a contractual claim for specific performance of CUF's obligations arising from the 2003 agreement. Ordinarily, a sale of an immovable property only results in transfer of ownership upon registration of transfer in the Deeds Office. Section 54 of the Act, however, provides for the transfer of ownership by operation of law. In *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*[2] the Court held (in the context of the transfer of rights by operation of Japanese law):

> "[21] As I see it, the resulting position is not materially different from the one created by our own legislature in the case of an amalgamation or takeover agreements between banks under s 54 (2) (b) of the Banks Act 94 of 1990. In such event, s 54 (3) of the Act essentially provides that all rights and obligations of the amalgamating banks or transferor bank

will vest in the amalgamated or transferee bank by operation of law. With reference to the situation thus created by the legislature, it was held in Absa Bank Ltd v Van Biljon and Another 2000 (1) SA 1163 (W) that the substitution of the transferee bank (ABSA) as plaintiff in an action previously instituted by the transferor bank (Bankorp) does not activate the provisions of s 15 (2) of the Prescription Act. By virtue of s 54 (3) of the Banks Act, so it was held, ABSA stepped into the shoes of Bankorp and became the plaintiff by operation of law."

[25] In *ABSA Bank* (*supra*) the Court considered the effect of section 54 (3) on the question of ownership of an immovable property, and the requirement in section 54 (8) for the endorsement of the title deeds. The Court said:

"[38] There remains the argument of Mr Jonker on effect (sic) of s 54 (8) of the Banks Act. Mr Jonker submitted, with reference to Lief NO v Dettman 1964 (2) SA 252 (A) at 267-70, that registration (endorsement) of the bond was necessary in order to constitute a real right of security in favour of ABSA, ie in the absence of endorsement ABSA Bank does not have any security arising out of the two covering bonds.

[39] It is off course trite that, in order to have a real right in the immovable property, registration is necessary. Mr Jonker submitted that, having regard to the general principles underlying the registration of cessions of the bonds, two steps are contemplated by s 54 (8) ie

39.1 the underlying agreement or causa for the transfer; and

39.2 the implementation of the underlying agreement by the endorsement by the Registrar of Deeds. …

[40] Only when the Registrar of Deeds endorses the bond document in terms of s 54 (8), so the submission goes, does ABSA have a real right in the immovable properties. This, in my view, ignores the express wording of s 54. One should approach s 54 on the basis that the language used by the legislator should be read in its ordinary sense. …

[42] That means, in my view, that where one reads "the Trustbank of Africa Limited" in any of the bonds, one is obliged, in terms of s 54, to read ABSA Bank Limited."

[26] On a proper interpretation of section 54 of the Act, therefore, CUF became the owner of the immovable properties on 25 October 2004. The contractual rights created by the 2003 agreement have been fulfilled, and CUF has assumed its obligations by operation of law. All that remains is for Second Respondent to comply with its statutory obligation in terms of section 54(8) of the act, namely to endorse the relevant deeds.

[27] CUF has submitted that RDS is seeking to introduce a new cause of action based upon section 54 of the Act. That is not correct. Section 54 does not establish a cause of action. The 2003 transaction did so. Section 54 merely creates the mechanism by which the transaction is given effect to. CUF's reliance on *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*[3] is therefore misplaced.

[28] Although the relief sought in the arbitration was couched in contractual terms, RDS' claim was, in truth, not a contractual claim. It's claim was for a declaratory order, based on the application of section 54 to the 2003 agreement, stating what the true legal position is in respect of ownership of the properties. Such a declaratory order is clearly competent in terms of section 21(1)(c) of the Superior Courts Act, 2013.

Prescription

[29] In terms of section 10 (read with section 11) of the Prescription Act, a 'debt' generally prescribes after three years. Although what constitutes a 'debt' is not defined in the Prescription Act, it was held in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[4] ("Eskom") that a 'debt' is "*that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another*". In *Desai NO v Desai and Others*[5] the Court seemed to espouse a wider definition. However, the Constitutional Court has now explained in *Makate v Vodacom Ltd*[6] that the approach in Eskom is correct, and that, to the extent that *Desai* suggests a wider definition, it is wrong. The Constitutional Court held in *Off-beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*[7] that a claim in terms of section 252 of the Companies Act, 1973 was not susceptible to prescription as it was not a debt under the Prescription Act. The Court said[8]:

"The claim is a far cry from something owed or due, or an obligation to pay money, deliver goods or render services to another. If anything, it is the right to seek a judicial determination as to whether the applicants are entitled to a statutory remedy, the entitlement to which is determined on equitable grounds…."

[30] I have dealt with CUF's submission above, that RDS' claim before us is a contractual one. It is not. The contract has been fulfilled and ownership of the properties has been transferred. In my view, the claim for endorsement of the title deeds to reflect the correct legal position is not a debt. It is not a claim for "*that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another*" as described in *Eskom* (*supra*), and even though CUF will attract substantial liabilities, it has already attracted these liabilities by operation of law, by virtue of the provisions of section 54 (3) of the Act. As has been held by the authorities mentioned above, not every obligation constitutes a debt. In my view, therefore, there is no remaining debt capable of prescribing.

The Henderson principle

[31] The Henderson principle requires a party to raise all matters in litigation that are relevant to the determination of the case. The principle is enunciated thus in *Henderson*:[9]

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which may have been brought forward as part of the subject of the contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[32] It was explained in the following manner in *Janse van Rensburg NO and others v Steenkamp and Another; Janse van Rensburg and Others v Myburgh and Others*[10]:

"[29] *In Arnold v National Westminster Bank PLC* 91991] 3 ALL ER 41 (HL) at 48 j Lord Keith pointed out that, although Henderson's was a case of action estoppel, the statement of the law that has been held to be applicable also to issue estoppel. The learned Law Lord had earlier referred (at 48e) to *Brisbane City Council v Attorney-General for Queensland* [1978] ALL ER 30 (PC) ([1979]AC 411 at 35-36 (at 425 AC), where Lord Wilberforce said:

'The second defence is one of res judicata. There has, off course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wicram VC in *Henderson v Henderson* (1843) 3 Hare 100 [1843-60] ALL ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] ALL ER Rep 56. A recent application of it is to be found in the decision of the board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was in the judgment of the board, there described in these words (at 590): '...there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. This reference to 'abuse of process' had previously been made in *Greenhalgh v Mallard* [1947] 2 ALL ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

[33] CUF submits that RDS should have raised the issue of section 54 in the arbitration, and having not done so, it was not open to RDS to do so in new litigation. RDS' answer is that much of the relief that it sought in the court a quo was aimed at the Registrar of Deeds, who was not, and could not have been, a party to the arbitration. It could not, it submits, have sought an order against the Registrar in the arbitration.

[34] RDS' argument may be correct in respect of paragraphs 5, 6 and 7 of the notice of motion. However, there is no reason why RDS could not have sought the declaratory relief in paragraphs 2, 3 and 4 of the notice of motion in the arbitration. RDS seems to suggest that in hindsight it should have done so.

[35] The declaratory relief sought in paragraphs 2 and 3 of the notice of motion seems, in my view, to have become academic, as there seems to be no dispute any longer that ownership of the properties and the rights and obligations of RDS as mortgagee transferred to CUF on 25 October 2004 by virtue of the operation of section 54(4) of the Act.

[36] The declaratory relief sought in paragraph 4 has also become moot by virtue of the arbitration appeal tribunal's finding that all of the properties in the debtor's book, including those in the Government Book, formed part of the assets to be transferred, even those properties not yet identified.

[37] Even if the appeal against those orders had not been rendered moot, I would nevertheless have held the view that this is one of the so-called "special cases" in which an exception should be made with regard to the application of the Henderson rule. Should we uphold the appeal on the Henderson principle, many scores of properties would remain registered in RDS' name, whilst, as a matter of fact, CUF is the owner of the properties.

[38] Such a situation is not in the interests of good public administration. The very purpose of the registration process is to maintain an accurate

record of ownership of immovable properties. In my view, such a situation should not be allowed to remain. A proper reading of *Janse van Rensburg NO* (*supra*) shows that a Court should consider where the equities lie in either refusing the claim on the Henderson principle, or allowing it to go forward in the interests of justice. In my view, this is not a matter wherein the Henderson principle should be applied. It is perhaps time for CUF to do what the arbitration appeal tribunal said it should, namely that CUF should "*take responsibility for what it agreed to undertake in the 2003 agreement.*"

[39] It is apparent from the above that we have taken a different approach to the matter than that taken by the Court a quo. We do not agree with the Court a quo on much of its reasoning, but, as is trite, an appeal lies against the order, not the judgment, and with regard to the order itself, we agree with the Court a quo.

[40] In the premises, I make the following order:

The appeal is dismissed with costs on Scale C, including the cost of senior counsel.

[redacted]

C SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree:

[redacted]

N BAM J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree:

[redacted]

P A VAN NIEKERK J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

[1] Wigram VC in Henderson v Henderson (1843) 3 Hare 100 [1843-60] ALL ER 378
[2] Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another 2011 (1) SA 35 (SCA)
[3] Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC)
[4] Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A)
[5] Desai NO v Desai and Others 1996 (1) SA 141 (A)
[6] Makate v Vodacom Ltd 2016 (4) SA 121 (CC)
[7] Off-beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others 2017 (5) SA 9 (CC)
[8] At para [49]
[9] Henderson v Henderson (1843) 3 Hare 100 [1843-60] ALL ER Rep 378
[10] Janse van Rensburg NO and others v Steenkamp and Another; Janse van Rensburg and Others v Myburgh and Others [2009] 1 ALL SA 539 (SCA)

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Instructed by:	**Macroberts Inc**
Heard on:	**18 February 2026**
Judgment on:	**5 March 2026**