



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 344/24

In the matter between:

GRANCY PROPERTY LIMITED

First Applicant

MONTAGUE GOLDSMITH AG (IN LIQUIDATION)

Second Applicant

and

DINES CHANDRA MANILAL GIHWALA

First Respondent

LANCELOT LENONO MANALA

Second Respondent

SEENA MARENA INVESTMENTS (PTY) LIMITED

Third Respondent

DINES CHANDRA MANILAL GIHWALA N.O.

Fourth Respondent

SHANTI GIHWALA N.O.

Fifth Respondent

KANTIELAL JERAM PATEL N.O.

Sixth Respondent

NARENDRA GIHWALA N.O.

Seventh Respondent

KIRAN GIHWALA N.O.

Eighth Respondent

Neutral citation: *Grancy Property Limited and Another v Gihwala and Others*
[2026] ZACC 40

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Mhlantla J, Nuku AJ,
Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgment: Mlambo DCJ (unanimous)

Heard on: 17 February 2026

Decided on: 9 October 2026

Summary: no-conflict rule — no-profit rule — disgorgement of profits

in duplum rule — development of common law — liquidated claims — statement and debatement of accounts

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is refused.
2. The applicants are ordered to pay the first, second and fourth to eighth respondents' costs in this Court, including the costs of two counsel where so employed.

JUDGMENT

MLAMBO DCJ (Dambuza J, Kollapen J, Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against parts of a judgment and order of the Supreme Court of Appeal¹ (SCA). That Court dismissed the applicants' appeal against the judgment and order of the High Court of South Africa, Western Cape

¹ *Grancy Property Ltd v Gihwala* [2024] ZASCA 144; 2025 (2) SA 76 (SCA) (SCA judgment).

Division, Cape Town (High Court).² Although the High Court had granted the applicants relief on a number of their claims, it dismissed their challenge to the application of the *in duplum* rule³ to interest on claims quantified through a statement and debatement process. The High Court also dismissed the applicants' claim for the disgorgement of secret profits made by the first and second respondents, while acting in a fiduciary capacity.

Parties

[2] The first applicant is Grancy Property Ltd (Grancy), a company incorporated in the British Virgin Islands with its principal place of business in Liechtenstein. Grancy is an entity used for investment purposes by Mr Karim Mawji, a Kenyan national who resides in the United Kingdom. The second applicant is Montague Goldsmith AG, a Swiss company (in liquidation) which acted on behalf of Grancy in respect of two black economic empowerment (BEE) investments that are at the centre of this matter. The applicants are together referred to as "Grancy".

[3] The first respondent is Mr Dines Chandra Manilal Gihwala, who, through the Dines Gihwala Family Trust (DGFT), participated in the Scharrig and Spearhead investments (discussed in more detail below). The second respondent is Mr Lancelot Lenono Manala, a businessman and an associate of Mr Gihwala, who participated in the Spearhead investment. The third respondent is Seena Marena Investments (Pty) Ltd (SMI), a company in which the DGFT and Mr Manala held equal shares prior to Grancy's involvement. The third respondent has not participated in the proceedings before this Court. The fourth to eighth respondents are the trustees of the DGFT. The first and fourth to eighth respondents will be referred to jointly as the "Gihwala respondents". When referencing both Mr Manala and the Gihwala respondents, they will be referred to jointly as the "respondents".

² *Grancy Property Ltd v Gihwala*, unreported judgment of the High Court, Western Cape Division, Cape Town, Case Nos 15757/2007 and 10547/2008 (18 August 2021) (High Court judgment).

³ The *in duplum* rule provides that interest stops running when the unpaid interest equals the outstanding capital amount (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* [1997] ZASCA 94; [1998] 1 All SA 413 (SCA); 1998 (1) SA 811 (SCA) at 827H).

Factual background

[4] The BEE investments at the centre of this matter are the Spearhead Property Holdings Ltd investment (also referred to as the Spearhead investment) and the Scharrig Mining investment. The Spearhead investment came about in February 2005 when Mr Gihwala (through the DGFT), Mr Manala and Grancy concluded the Spearhead agreement to acquire Spearhead units. The three parties agreed that for purposes of this investment, they would utilise SMI as a corporate vehicle in which each held one third of its shares. Furthermore, SMI was to acquire 58% of the shares in Ngatana Property Investments (Pty) Ltd (Ngatana), being the corporate vehicle that would hold the 3.5 million Spearhead units acquired through the BEE transaction. Unless otherwise agreed by the three parties, the investment by Ngatana would be restricted to an investment in the 3.5 million Spearhead units. Messrs Gihwala and Manala were directors of SMI and also directors of Ngatana (as SMI's nominees). Messrs Gihwala and Manala, as directors of Ngatana, later approved Ngatana's investment, within the context of the Spearhead agreement, in another investment, known as the Cape Gannet investment (described more fully below).

[5] In October 2007, Cape Gannet Properties (Pty) Ltd (Cape Gannet), Redefine Income Fund Ltd (Redefine) and "incoming unit holders", of which Ngatana was one, concluded a subscription agreement whereby Cape Gannet was to act as a nominee for the incoming unit holders. Ngatana, as one of the incoming unit holders, was to acquire 20 million units in Redefine. This investment was approved by Mr Gihwala (representing the DGFT) and Mr Manala as shareholders and directors of SMI, but more importantly, in their capacity as shareholders and directors of Ngatana. Because Grancy was a shareholder in SMI, it stood to benefit or suffer proportionately with Messrs Gihwala and Manala depending on whether the Cape Gannet investment made a profit or a loss. It is common cause that this investment was profitable and all involved have benefitted proportionally to their interests and continue to benefit.

[6] The other BEE investment involved Scharrig Mining Ltd (Scharrig). Mr Gihwala, through DGFT, and Grancy entered into a joint venture agreement so that they could participate equally in a BEE consortium to purchase shares in Scharrig. Grancy's complaint is that Mr Gihwala maintained that the DGFT only held 4% of the shares in Scharrig, while not disclosing that the DGFT had, in actual fact, received a total of 7.5% of the shares, which resulted in additional undisclosed profits. Grancy thus sought an accounting from Mr Gihwala and this gave rise to the litigation between the parties.

Litigation history

High Court

[7] This application is the culmination of some 16 years of continuous litigation by Grancy against Mr Gihwala, the DGFT and Mr Manala, to obtain an accounting from them to show how its funds were utilised in the investments it participated in, and to quantify its claims against them. The claims forming part of this application arise from the second stage of a two-stage accounting and debatement procedure envisaged in the order of the SCA in *Grancy Property Limited v Seena Marena Investments (Pty) Ltd*⁴ (the debatement order).

[8] In relation to the Cape Gannet investment, Grancy's case was that this investment was concluded by Messrs Gihwala and Manala contrary to the Spearhead agreement, as it was without Grancy's consent. Furthermore, it is alleged to have been in breach of Messrs Gihwala and Manala's fiduciary duties to Grancy. Grancy alleged that Messrs Gihwala and Manala were obliged to account for all profits made on the Cape Gannet investment, not merely Grancy's proportionate share of the profit as a shareholder in SMI (which in fact it always received). Grancy claimed that as the Cape Gannet investment was without its consent, it was unauthorised, and therefore whatever profits earned by Messrs Gihwala and Manala were secret profits and had to be disgorged to its benefit.

⁴ *Grancy Property Limited v Seena Marena Investments (Pty) Ltd* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA).

[9] The High Court rejected this claim, holding that the central principle underlying a claim for the disgorgement of secret profits is to ensure that a fiduciary's interests do not conflict with those of the principal. It held that there was no conflict between Grancy's interests and those of Mr Manala and the Gihwala respondents. Furthermore, the Court relied on Grancy's failure to object to or demand that Ngatana dispose of the units acquired through the Cape Gannet investment, despite said investment being public and the fact that Grancy had benefited from the investment and continues to receive dividends. The High Court held that, as Grancy was aware of the investment, the profit could not be regarded as "secret".

[10] Regarding the Scharrig investment, Grancy's case was that the debts owed to it in this investment, including those arising from the Spearhead investment, were all subject to statement and debatement processes, and, as such, they were unliquidated. Grancy argued that based on this, the *in duplum* rule did not apply to these debts.

[11] The High Court rejected this claim as well, holding that the debts in respect of which Grancy had been granted judgment, being those arising from the Scharrig and Spearhead investments, were all liquidated amounts, which precluded the Court from applying section 2A(5) of the Prescribed Rate of Interest Act⁵ (PRI Act). The Spearhead-related investment in which Grancy had succeeded was in relation to an investment known as the Strand investment. While there was no need to consider the question of arrear interest after deciding that the debts were liquidated amounts, the Court held the view that, in any event, this was an instance of arrear interest to which the *in duplum* cap applies. The High Court further held that there were insufficient grounds to depart from the long line of authorities and to permit the relaxation of the *in duplum* rule, either generally or in relation to statement and debatement of account

⁵ 55 of 1975. Section 2A(5) of the PRI Act provides:

"Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

matters. This, the High Court said, was irrespective of the extent to which the conduct of the debtor may have warranted such a departure.

Supreme Court of Appeal

[12] The SCA confirmed the High Court's finding that all of Grancy's claims were liquidated amounts as they were either quantified in the particulars of claim or capable of prompt and speedy ascertainment. It held, further, that the interest claimed was arrear interest which is subject to the *in duplum* rule.

[13] The SCA then considered Grancy's argument that, in the event that its claims were found to be liquid, the Court should develop the common law to relax the application of the *in duplum* rule with regard to claims that were the subject of statement and debatement processes. The SCA concluded that it was impermissible to introduce this argument at the end of the trial. It held that basic procedural fairness dictates that a party is entitled to know what case it is confronted with before it presents its own case. Further to this, it emphasised that litigants are obliged to raise constitutional arguments in litigation at the earliest possible opportunity to ensure that jurisprudence under the Constitution develops reliably and harmoniously.

[14] The SCA cautioned against appellate courts developing the common law as courts of first and last instance, due to the risk of prejudice to respondents, which would occur if the SCA were to entertain Grancy's assertions. The SCA further cautioned against courts intruding into the realm of the Legislature when decisions of law reform are to be made. It concluded that, as the *in duplum* rule is a settled principle of South African law, the development for which Grancy contended would have involved complex law reform which is best left to Parliament.

[15] In any event, the SCA found that Grancy's submissions regarding the development of the common law relating to the *in duplum* rule did not withstand scrutiny. It opined that this case demonstrates that the development of this rule is unnecessary, as a creditor can, as Grancy did, advance its claim even without adequate

accounting. The SCA pointed out that Grancy's argument based on adequate accounting was unsustainable, as demonstrated by its own action in initiating its claims whilst the statement and debatement procedures were ongoing. The SCA stated that the argument presented by Grancy would allow creditors to bypass the consequences of the *in duplum* rule by alleging that they do not have adequate accounting, even in circumstances where they had the necessary information to pursue a claim.

[16] Coming to the disgorgement claim in respect of the Cape Gannet investment, the SCA upheld the High Court's dismissal of Grancy's claim on the basis that the purpose of a claim of this nature is to ensure that a fiduciary's interests do not conflict with those to whom the fiduciary owes duties of trust. This finding included an analysis of the application of, and distinction between, the "no-profit" and "no-conflict" rules. The SCA relied on *Robinson*⁶ in which Innes CJ described these rules as follows:

"Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty."⁷

[17] Further to the above, the SCA confirmed that the two rules extend to both actual conflicts of interest and to cases in which there is a real, sensible possibility of conflict, with only the free consent of the principal after full disclosure acting as a defence to a fiduciary who breaches this trust.⁸ Furthermore, once the breach of a fiduciary duty is established, the fact that the principal has suffered no loss or damage, or that the profit was not made at its expense, is irrelevant.⁹

[18] The SCA found that there was no conflict of interest in the Cape Gannet investment. It concluded, specifically, that there was no conflict between Mr Manala

⁶ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177.

⁷ Id.

⁸ *Phillips v Fieldstone Africa (Pty) Ltd* [2003] ZASCA 137; [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 (SCA); (2004) 25 ILJ 1005 (SCA) at paras 31-2.

⁹ Id.

and the Gihwala respondents' personal interests and those of Grancy, and therefore no breach of a fiduciary duty had occurred. It further stated that Messrs Gihwala and Manala stood to either benefit or suffer from the fate of the Cape Gannet investment in precisely the same way as Grancy, since all of them were shareholders (directly or indirectly) in SMI. Furthermore, it held, agreeing with the High Court's findings, that the investment was not secret; it was a public investment which Grancy had known about for years, and from which it had benefited and continued to benefit. It concluded that Grancy had not objected to the investment or demanded that the units acquired through the investment be disposed of. Finally, it held that the fact that Grancy may not have been informed of the investment, and did not consent to it, did not mean that its interests diverged from those of Messrs Gihwala and Manala.

This Court

Grancy's submissions

Jurisdiction

[19] Grancy submits that this matter engages this Court's general jurisdiction. First, Grancy submits that the incorrect application and misinterpretation of the law applicable to secret profits raises an arguable point of law of general public importance that this Court ought to consider. Second, Grancy submits that the characterisation of claims as liquid or illiquid and the application of the *in duplum* rule in the context of the statement and debatement of accounts also raises arguable points of law of general public importance. Grancy submits that it is in the interests of justice for this Court to consider this matter. While not explicitly referencing this Court's constitutional jurisdiction, Grancy submits that this Court's jurisdiction is engaged as its right of access to courts under section 34 of the Constitution is implicated by the application or suspension of the *in duplum* rule. Grancy submits that, in mischaracterising its claim and failing to develop the common law, the SCA failed to promote, respect or give effect to Grancy's section 34 right and unlawfully limited it.

[20] Concerning the characterisation of Grancy's claim as liquid and the application of the *in duplum* rule, Grancy avers that the SCA based its findings on at least three fundamental errors. It argues that: firstly, the SCA erred in finding that because an amount can be quantified in the particulars of claim, the claim must be liquidated; secondly, the SCA erred in finding that interest on an unliquidated debt is arrear interest and in declining to exercise any discretion to invoke section 2A(5) of the PRI Act; and thirdly, the SCA misconstrued the requirements to be met if a party in the position of Grancy requests a judicial development of the common law. Grancy submits that these issues raise arguable points of law of general public importance. Further, it submits that the issues extend beyond the interests of the parties in this matter and that the test adopted by the SCA regarding its submissions to develop the common law is of great public interest.

[21] In sum, Grancy submits that the issues raised are essentially concerned with the law, being the scope of the *in duplum* rule and the development of the common law. These points are averred to be arguable in that Grancy's appeal has prospects of success. Further, as mentioned above, it is submitted that the determination of the issues transcends the narrow interests of the parties.

[22] Regarding the claim for disgorgement of secret profits, in its written submissions, Grancy contends that the SCA misapplied the law. It argues that the SCA either misconstrued the existing law or created new law. Grancy submits that the SCA mischaracterised the law in finding that there was no conflict between the parties because their interests were aligned. In both the founding affidavit and written submissions, Grancy averred that the SCA applied the incorrect legal standard.

Leave to appeal

The in duplum argument

[23] Grancy disputes the application of the *in duplum* rule to the Scharrig investment. Central to its argument is that its claim is for an unliquidated amount, which entitles it

to pre-judgment interest, permitting the total interest to exceed the *in duplum* limitation. Grancy contends that the *in duplum* rule only applies to arrear interest¹⁰ and, as the amount claimed is pre-judgment *mora* (delay) interest, it is not classified as arrear interest and is subject to the application of section 2A(5) of the PRI Act. Grancy submits, further, that by nature of the accounting process, the debt owed as a result of the investment is not liquidated.

[24] Based on its averments set out above, Grancy submits that the interest on the pre-judgment sums awarded in respect of the Spearhead investment (the Strand investment) should likewise not be subject to an *in duplum* cap, as it was also subject to a statement and debatement of account process.

[25] Grancy, at the request of this Court, filed a post-hearing note to clarify which claims it submits are not subject to the *in duplum* rule. The note is useful in its specification of which claims Grancy submits were subject to a statement and debatement of account.

[26] Grancy further submits that where a court is dealing with an unliquidated debt, the court has the discretion to fix any interest regime that is just in terms of section 2A(5) of the PRI Act, even if the *in duplum* rule would ordinarily apply. It avers that section 2A(5) was created to cure the injustice that would arise by letting someone profit from their own unlawful conduct and where there has been a delay in obtaining an account which impaired Grancy's ability to bring a claim. Grancy alleges that this aligns with the conduct of the Gihwala respondents. It submits that, despite the findings of the High Court and the SCA, its claim was not capable of prompt ascertainment, as the extent of the claim took years of litigation to uncover.

[27] Grancy further argues, on this score, that a debtor should not benefit from *in duplum* protection in statement and debatement of account proceedings until the

¹⁰ *Drake Flemmer and Orsmond Inc v Gajjar N.O.* [2017] ZASCA 169; [2018] 1 All SA 344 (SCA); 2018 (3) SA 353 (SCA) at para 84.

debtor delivers a full and proper account of the debt. A statement and debatement of account is not a process which inherently deals with liquidated debts. Furthermore, a statement and debatement of account is a remedy drawn from English law, not Roman-Dutch law, whereas the *in duplum* rule is a product of Roman-Dutch law. Therefore, sums claimed thereunder are not subject to the *in duplum* rule as a matter of law.

[28] To the extent that certain sums ordered pursuant to a statement and debatement process are found to be debts subject to the *in duplum* rule, Grancy contends that there is an obligation on this Court to develop the common law. It maintains that there is no complexity or adverse consequences that would arise if the Court were to develop the common law regarding interest, as it did in *Paulsen*,¹¹ because Parliament could still change the law after this Court's order. Grancy argues, further, that the only additional interest exposure to debtors would be occasioned by a debtor failing or refusing to render an account when required to do so.

[29] In Grancy's view, the development would be simple and narrow in that, in matters where a debtor owes a duty to account, interest for the period before an adequate and accurate account is rendered is not subject to any *in duplum* limitation. Should a creditor abuse this regime by refusing to accept an adequate and accurate account in the hope of artificially growing its interest claim, then a court would have the discretion to award interest reflective of such an abuse of process. Furthermore, so the argument goes, there is little risk of prejudice to debtors as it is the debtor who would "control the clock" by accounting timeously and properly.

The disgorgement argument

[30] Regarding its disgorgement claim, Grancy argues that the SCA erred in holding that a central principle underlying a claim for disgorgement of secret profits is to ensure

¹¹ *Paulsen v Slipknot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

that a fiduciary's interests do not conflict with those of the principal. Grancy avers, further, that the SCA incorrectly placed reliance on the fact that the investment turned out to be profitable and that Grancy benefitted and continues to benefit from the investment. Grancy submits that what is relevant is that the investment was unauthorised and placed Grancy at risk. It argues that the fact that the investment happened to be successful is not determinative of its lawfulness.

[31] Further to the above, Grancy claims that the SCA failed to apply the correct test in determining whether there was a breach of the no-conflict rule or no-profit rule, as set out in *Symington*¹² and *Phillips*.¹³ Grancy points out that the test, espoused in these judgments, is to the effect that any profit made by the fiduciary through the breach of their fiduciary duty must be paid to the principal and it is only the free consent of the principal, after full disclosure, that will suffice as a defence to a breach of this nature. Furthermore, whether damages are suffered is irrelevant to the inquiry.¹⁴

[32] Based on this statement of the law, Grancy submits that, on a proper application of the principles, the SCA should have found that any profits Messrs Gihwala and Manala made through the Cape Gannet investment stood to be disgorged for its benefit. Grancy pointedly argues, in its founding affidavit in this Court, that the key question is the proper remit of the no-conflict rule, which it avers has been misconstrued, misstated and then misapplied by the SCA. Whilst it appears in some parts of Grancy's pleadings and written submissions that it also places reliance on the no-profit rule, it makes the forthright contention that the profits earned by Messrs Gihwala and Manala stand to be disgorged to it on the basis that they acted without its authority to make the investment and that this contravened the no-conflict rule. Grancy argues that it is the unauthorised nature of the transaction that results in the fiduciaries acting in conflict with Grancy's interests as principal.

¹² *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] ZASCA 47; [2005] 4 All SA 403 (SCA); 2005 (5) SA 550 (SCA) at para 24.

¹³ *Phillips* above n 8 at para 31.

¹⁴ *Symington* above n 12.

*The respondents' submissions**Jurisdiction*

[33] The respondents submit that neither this Court's constitutional nor general jurisdiction is engaged. They aver that the issues raised focus on the application of settled legal principles. Mr Manala also argues that the issues raised by Grancy do not transcend the interests of the parties and that Grancy has failed to demonstrate that the issues are of any importance beyond the commercial interests of the parties. The Gihwala respondents point out that Grancy grounds its case in a misapplication of law, which does not fall within this Court's jurisdiction. Citing this Court's judgments in *Mankayi*¹⁵ and *Jiba*,¹⁶ they claim that this Court has made it clear that an alleged misapplication of the law or of a settled legal principle by a lower court is not a matter that falls within this Court's constitutional or general jurisdiction.

Leave to appeal

[34] The Gihwala respondents submit that if this Court were to find that it has jurisdiction, it should nevertheless refuse leave to appeal because it is not in the interests of justice to grant leave to appeal. This is based on the Gihwala respondents' submission that there are little, if any, prospects of success.

The in duplum argument

[35] Regarding the submissions on interest and the applicability of the *in duplum* rule, the Gihwala respondents aver that Grancy's claims are liquidated. They draw this Court's attention to the quantification of the claims in the particulars of claim in the High Court, with the calculations of the claims being a matter of simple arithmetic. The Gihwala respondents submit that Grancy has misconstrued the SCA's finding. They submit that the SCA's finding that the amounts were liquid was based on Grancy having

¹⁵ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) at para 12.

¹⁶ *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at paras 58-9.

pleaded quantified amounts in its particulars of claim or on those amounts being capable of prompt and speedy ascertainment. They emphasise that Grancy has been unable to point to any authority to support the proposition that the *in duplum* rule does not apply to proceedings involving statement and debatement of account claims. The Gihwala respondents submit that Grancy is incorrect in its understanding that interest on unliquidated debts is not arrear interest. They submit that whether the debt is liquidated or unliquidated, the *in duplum* rule applies.

[36] Regarding Grancy's alternative argument for the development of the common law, the respondents submit that this issue was not pleaded in the High Court and not properly pleaded before the SCA. They submit further that Grancy's arguments about why the common law should be developed are unsound. They aver that the development contended for by Grancy would enable a creditor to exclude itself from the application of the *in duplum* rule by contending that it requires an adequate accounting in circumstances where it has the necessary information to pursue a claim but elects not to do so. They accuse Grancy of doing this. The Gihwala respondents further argue that creditors might be incentivised to dispute the adequacy of the accounting for as long as possible to the detriment of debtors. They argue that the complex reform that such a development would require in order to balance the interests of both creditors and debtors should rightfully be left in the hands of the Legislature.

The disgorgement argument

[37] With reference to the claim for secret profits on the Cape Gannet investment, the Gihwala respondents submit that the jurisprudence to which the High Court and the SCA had regard is clear: "a claim for a secret profit arises where the fiduciary's duty in acquiring the profit amounts to a conflict of interest between their own interests and those to whom they owe duties of trust". Therefore, as the Gihwala respondents and Mr Manala did not make a secret profit at Grancy's expense or act in a manner where their interests conflicted with Grancy's, a claim for the disgorgement of profits is not available to Grancy. The Gihwala respondents further submit that Grancy's argument ignores the fact that there is, and was, nothing secret about the Cape Gannet investment.

They say it has, for many years, been known to Grancy, which had neither objected to the investment nor requested that Ngatana dispose of the units acquired through this investment. On the contrary, the Gihwala respondents argue that Grancy has benefitted from the investment.

Analysis

Jurisdiction

[38] It is trite that jurisdiction is determined on the pleadings.¹⁷ Section 167(3)(b)(i) and (ii) of the Constitution grants this Court jurisdiction over constitutional matters and any other matter that raises an arguable point of law of general public importance which ought to be considered by this Court. Section 167(3)(c) of the Constitution empowers this Court to make a final decision whether a matter falls within its jurisdiction.

[39] Disputes considered to be constitutional matters include the following: a dispute over the interpretation, protection or enforcement of the Constitution;¹⁸ the question whether the interpretation of any legislation promotes the spirit, purport and objects of the Bill of Rights;¹⁹ a need to interpret legislation or develop the common law to align with the spirit, purport and objects of the Bill of Rights;²⁰ a review of public power;²¹ the consideration of constitutionally envisaged legislation;²² and consideration of fair procedure or the powers of courts.²³ This is not an exhaustive list.

¹⁷ Id at paras 38-9, referencing *Gcaba v Minister for Safety and Security* [2009] ZACC 26; [2009] 12 BLLR 1145 (CC); (2009) 30 ILJ 2623 (CC); 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC) (*Gcaba*) at para 75.

¹⁸ Section 167(7) of the Constitution. See also *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) (*Boesak*) at para 14.

¹⁹ *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) at para 4 and *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 18.

²⁰ Section 39(2) of the Constitution.

²¹ *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 20.

²² *National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd)* [2020] ZACC 7; 2020 (6) BCLR 725 (CC); [2020] 7 BLLR 645 (CC); (2020) 41 ILJ 1846 (CC) at para 27.

²³ *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43; 2023 (3) SA 36 (CC); 2023 (3) BCLR 296 (CC) at paras 1 and 23; *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC

[40] Furthermore, section 167(3)(b)(ii) empowers this Court to decide any other matter if it raises an arguable point of law of general public importance which ought to be considered by this Court. Fulfilling the criterion of being an arguable *point of law* requires that the matter before this Court cannot be a purely factual dispute.²⁴ For the point of law to be considered arguable, it must entail some degree of merit in the argument, meaning it must have some measure of plausibility.²⁵ Some factors that contribute to a point of law being considered arguable include that the SCA has expressed itself on the matter by a narrow majority; different divisions of the High Court have expressed divergent views; there is no authoritative pronouncement on the issue; the matter is a new and difficult question of law; or the answer to the question in issue is not readily discernible.²⁶ To be considered a matter of general public importance, it must transcend the narrow interests of the litigants and implicate the interests of a significant part of the general public.²⁷ In determining whether the point ought to be considered, this Court must find that to do so would be in the interests of justice.²⁸

[41] Grancy's application, on the one hand, is directed at the SCA's order that its claim arising from the Scharrig investment is liquidated. Grancy, in the alternative, applies for leave to appeal the dismissal of its case that the common law be developed to limit the application of the *in duplum* rule. On the other hand, Grancy applies for leave to appeal the SCA's dismissal of its disgorgement claim arising, specifically, from the Cape Gannet investment. It must be clear from the pleadings that a constitutional issue or an arguable point of law of general public importance is being raised.

39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at para 62; and *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) at para 10.

²⁴ *Jiba* above n 16 at para 58.

²⁵ *Paulsen* above n 11 at para 21.

²⁶ *Id* at para 23.

²⁷ *Id* at para 26.

²⁸ *Id* at para 30 with reference to *Boesak* above n 18 at paras 11-12.

Therefore, it behoves us to consider Grancy's pleadings to determine whether this Court's jurisdiction is engaged on either issue.

The Spearhead (Cape Gannet) investment

[42] In its founding affidavit, Grancy requests this Court "to correct the SCA's misapplication of the law pertaining to secret profits". Grancy bolsters this claim by referring to the SCA's statement that there was no misalignment of interests between the fiduciaries (Messrs Gihwala and Manala) and the principal (Grancy).

[43] Grancy further contends that the SCA erred in "misconstruing and reshaping (potentially inadvertently) the law regarding secret profits (in the context of an unauthorised investment in the Spearhead investment)". In its pleadings, Grancy vacillates between arguing that the SCA misapplied the law, which would not engage our jurisdiction, and that it misinterpreted the law, which could trigger our jurisdiction. These wavering lines of argument continued in Grancy's oral submissions, putting this Court in the undesirable position of deciphering what Grancy's argument actually is.

[44] It is therefore necessary to consider the treatment of this part of Grancy's case by the SCA, to ascertain whether it misapplied settled principles of law or misstated the law. To aid in this evaluative exercise, this Court must elucidate the scope of the relevant legal principles relating to the no-conflict and the no-profit rules, and how these principles were applied by the SCA.

[45] The no-conflict and no-profit rules involve two distinct strands of fiduciary duties.²⁹ The existence of the fiduciary duties involved in the two rules was confirmed by this Court in *NUMSA*.³⁰ There, this Court defined the scope of these rules as follows:

²⁹ *MMA Architects CC v Mpahlwa* [2011] ZAWCHC 259 (*MMA Architects*) at para 14 citing *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (*Ultraframe (UK)*).

³⁰ *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* [2019] ZACC 25; 2019 (5) SA 354 (CC); 2019 (8) BCLR 966 (CC) at para 55.

“The two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profit for themselves that has not been properly disclosed or consented to by the beneficiary.”³¹

[46] Importantly, this Court recognised that a breach of fiduciary duties gives rise to two distinctive remedies: the principal’s claim for rescission and for the fiduciary’s disgorgement of profits, coupled with the corresponding strict liability to account.³² Disgorgement is a remedy which requires a fiduciary to surrender any profits made from illegal or unethical or unauthorised conduct. It moves beyond simply compensating the principal but entails stripping away all benefits gained from the misconduct so as to ensure that the wrongdoers do not profit from their actions and, thereby, also acts as a deterrent. These remedies are granted to the principal after proving on a balance of probabilities that the “fiduciary made a profit in circumstances where there was a conflict of interests or by virtue of the fiduciary position”.³³ Although the two duties are distinct, they are also interlinked.

[47] A frequently cited authority on these duties is *Robinson*. There, these duties are described in the following terms:

“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, *he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty*. The principle underlies an extensive field of legal relationship. . . . *It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash*. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profits belong not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free

³¹ Id.

³² Id.

³³ Id.

consent of the principal following upon full disclosure by the agent.”³⁴ (Emphasis added.)

[48] Distilled to its bare essentials, the no-conflict rule can be described as prohibiting fiduciaries from putting themselves in a position where their personal interests may conflict with those of the principal.³⁵ The primary remedy for breach of the no-conflict rule is to disgorge the profits made by the fiduciary, irrespective of whether the principal suffered any loss.³⁶ This remedy serves a prophylactic function: to deter the fiduciary from breaching duties owed to the principal.³⁷

[49] The content and scope of the no-profit rule is described in *MMA Architects*, relying on *Ultraframe (UK)*, as “requir[ing] a director to account for any profit that he makes from his position unless there has been consent”.³⁸ A more apt description of the rule is that a director may not make “an unauthorised profit” from his fiduciary position.³⁹

[50] A fuller exposition of the no-profit rule has recently been provided by the United Kingdom Supreme Court in *Rukhadze*⁴⁰ which expressed the view that—

“the fiduciary duty to account for profits is a rule governing the conduct of fiduciaries which exists in its own right. It is a duty or obligation imposed by equity on all fiduciaries, as an inherent aspect of their undertaking of single-minded loyalty to their principals. It is not just a discretionary equitable remedy for the breach of some other duty, such as the conflict rule, nor is it necessarily triggered by some other breach, although it very often is. A fiduciary may come to generate a profit out of his role as such without committing any breach of trust. It may be an authorised use of the trust

³⁴ *Robinson* above n 6 at 177-8.

³⁵ Cassim “The saga of *Grancy Property v Gihwala*: The no-conflict and no-profit rules and the fiduciary” (2025) 58 *De Jure Law Journal* 92 at 94.

³⁶ *Id* at 97.

³⁷ *Id*.

³⁸ *MMA Architects* above n 29 at para 14.

³⁹ *Id* and *Ultraframe (UK)* above n 29 at 1322. See also *NUMSA* above n 30.

⁴⁰ *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10.

property, or of his fiduciary powers. But he must then account for that profit if it has been made from or out of his fiduciary position, not keep it for himself. The wrong which may lead to a court order for an account of profits is, in such a case, no more or less than the failure to account itself, by a fiduciary who wishes to keep the profit for himself.”⁴¹

[51] The SCA relied on *Phillips* when stating that “a claim for a secret profit arises where the fiduciary’s duty in acquiring the profit amounts to a conflict of interest between their own interests and those to whom they owe duties of trust”.⁴² *Phillips* was decided based on the no-conflict rule.⁴³ The employee was found to have “succumbed to a potential conflict of interest between his duty and his self-interest” and consequently he had to disgorge the profits that he made.⁴⁴

[52] There is no doubt that the SCA applied the no-conflict rule. This is apparent in its application of the law to the facts of this case. It did not misconstrue or reshape the law. Disgorgement of profits under the no-conflict rule arises when a conflict of interest is proven between the fiduciary’s personal interests and those of the principal. It is therefore evident that the SCA correctly stated the law. Thus, the claim by Grancy that the SCA misstated the law or reshaped the law is unsustainable.

[53] The SCA stated that Grancy contended that “‘conflict of interest’ is inherent in the fact that Grancy was not informed of the investment and the investment was not authorised”.⁴⁵ The SCA construed these facts not to give rise to a conflict of interest.⁴⁶ It concluded that there was no divergence of interests between those of Grancy and the personal interests of Mr Manala and the DGFT.⁴⁷ In its founding affidavit in this Court,

⁴¹ Id at para 20.

⁴² SCA judgment above n 1 at para 203.

⁴³ *Phillips* above n 8 at paras 37-9.

⁴⁴ Id at para 39.

⁴⁵ SCA judgment above n 1 at para 206.

⁴⁶ Id.

⁴⁷ Id.

Grancy stated that “[t]he key question is the proper remit of the no-conflict of interest rule”. Its submissions, as contradictory as they are at times, disclose that this was the ambit of the case that was before the SCA. In this context, it cannot be held that the SCA applied an incorrect legal standard. Furthermore, the SCA’s finding that the interests of Grancy and Messrs Gihwala and Manala were aligned is not a statement of law, but a factual finding. Finally, an argument that the SCA conflated the no-conflict rule with the no-profit rule cannot be sustained, as explained above.

[54] The SCA did not consider whether the no-profit rule was applicable to the Cape Gannet investment, as it did in the Strand investment. In respect of that claim, Grancy made out a case based on the no-profit rule and was successful. In that instance, the SCA found that the respondents had secretly invested Grancy’s funds and kept the profits generated rather than account to Grancy. That is not what happened in the Cape Gannet investment. Grancy’s interests were intertwined with those of the respondents in Ngatana, which undertook the Cape Gannet investment. Grancy was aware that Messrs Gihwala and Manala were also investors like it in SMI and Ngatana. This Court in *Spilhaus*⁴⁸ stated that “[o]nce a claim has been selected and advanced in pleadings before a competent court, that court is under a duty to adjudicate the claim”.⁴⁹ The claim advanced by Grancy was that the SCA incorrectly applied the law on secret profits and misinterpreted the relevant principles in this case. Grancy did not aver that the SCA failed to consider the no-profit rule in the context of this investment. The absence of this claim in the founding affidavit is fatal to any attempt by Grancy to assert it in this Court.⁵⁰ Therefore, I conclude that the jurisdiction of this Court is not engaged regarding the disgorgement claim.

⁴⁸ *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).

⁴⁹ Id at para 38.

⁵⁰ See *Jiba* above n 16 at para 38.

The Scharrig investment

[55] Grancy has presented two primary arguments in respect of how the dispute surrounding the Scharrig investment engages this Court’s jurisdiction. The first is that the SCA committed a fundamental error of law in mischaracterising the nature of its claims as liquid, which results in the exclusion of any interest arising from those claims from the ambit of section 2A(5) of the PRI Act. It argues, further, that the SCA, after wrongly concluding that the claims were liquid, incorrectly held that interest which accrues on an unliquidated debt will ordinarily be arrear interest. In the second argument, which is in the alternative, Grancy argued that, to the extent that its claims are for liquidated amounts and subject to the *in duplum* rule, the SCA failed to develop the common law regarding the application of the *in duplum* rule in the context of claims involved in statement and debatement of account proceedings. It says that the SCA’s mischaracterisation of its claims and failure to develop the common law resulted in a failure to promote, respect or give effect to Grancy’s section 34 right as a creditor, and unlawfully limited this right.

The characterisation of the claim

[56] In considering these submissions, it is important to mention that Grancy’s submissions evince a number of inconsistencies. In this regard, Grancy initially submitted that the SCA made an “error of law” in mischaracterising the nature of its claims as liquidated when, in its view, they are plainly unliquidated. Grancy then averred that the SCA made an “erroneous application of the law”, in that its claim was for an unliquidated debt as shown by the oral and expert evidence, which indicated that the quantification of the debt depended “on a number of unknown factors and required determination by [the] [c]ourt”. Finally, Grancy averred that the SCA “erred in misconstruing the notion of a claim for an unliquidated amount, and thus erroneously denied Grancy the benefit of section 2A(5)”.

[57] During argument, counsel for Grancy was directed to the founding affidavit and confronted with the characterisation of this claim as an erroneous application of the law

or the misapplication thereof, and not the adoption of an incorrect legal standard. Counsel for Grancy initially pointed out that, in other parts of its founding affidavit, the correct case was made. Eventually counsel conceded this point, however not without reiterating that Grancy “[does] say today that the incorrect legal standard was applied”. It must be repeated that this Court has in a number of matters pointed out that jurisdiction is established on the pleadings, not in argument.⁵¹

[58] In *Villa Crop*⁵² this Court distinguished a misapplication of the law from an error of law. With regard to the former, this Court held that a misapplication of law ordinarily occurs when a legal standard that is correctly stated and adopted is then applied to the facts so as to arrive at a conclusion that cannot be sustained.⁵³ With regard to the latter, the adoption of an incorrect legal standard to decide a matter is considered an error of law.⁵⁴ This Court explained that in the latter situation “[i]t is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure properly to apply the law to the relevant facts”.⁵⁵

[59] In this matter, the SCA, like the High Court, in finding that the claims were “capable of prompt and speedy ascertainment”,⁵⁶ appreciated the correct legal standard to apply in establishing whether a debt is liquidated or unliquidated. It has been said that whether a debt is capable of speedy ascertainment is a decision that is left to the discretion of the trier of fact in each particular case, having regard to the facts before the court.⁵⁷ This means that whether a debt is capable of prompt and speedy ascertainment is inherently a factual inquiry.

⁵¹ *Gcaba* above n 17 at para 75, referencing *Chirwa v Transnet Ltd* [2007] ZACC 23; [2008] 2 BLLR 97; 2008 (3) BCLR 251; 2008 (4) SA 367 (CC); (2008) 29 ILJ 73 at para 169, and *Paulsen* above n 11 at para 14.

⁵² *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC).

⁵³ *Id* at para 64.

⁵⁴ *Id* at para 65.

⁵⁵ *Id*.

⁵⁶ SCA judgment above n 1 at para 222.

⁵⁷ *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 1 SA 736 (T) at 738F.

[60] In my view, Grancy cannot avoid the inevitable conclusion that the determination of whether a debt is liquidated or unliquidated is essentially a fact-bound inquiry,⁵⁸ and both the High Court and the SCA arrived at their findings after conducting such an inquiry. This Court's reluctance to interfere with factual findings made by lower courts was made clear in *Mankayi*⁵⁹ and *Jiba*.⁶⁰ This analysis clearly shows that Grancy's submission that the SCA misconstrued its claims as liquidated is unsustainable, and does not meet the required threshold for engaging the jurisdiction of this Court.

Development of the common law

[61] Grancy argued, in the alternative, that this Court's jurisdiction is engaged as, in matters involving statement and debatement of accounts, the common law must be developed to restrict the application of the *in duplum* rule. It is so that in cases involving the development of the common law, this Court's constitutional jurisdiction is engaged.⁶¹ In so far as this Court's general jurisdiction is concerned, it may be engaged, but this is dependent on whether the interests of justice favour considering the question of law: if it is not in the interests of justice to do so, the legal point is not one that "ought to be considered by [this] Court".⁶² Only when a positive finding is made, borne out of the exercise of our discretion, that the interests of justice favour entertaining the legal question, will general jurisdiction be engaged.⁶³

⁵⁸ Id; *Neves Builders & Decorators v De La Cour* 1985 (1) SA 540 (C); [1985] 3 All SA 296 (C) at 544G-545C; *Rospa Trading 289 CC v Maluti-A-Phofung Local Municipality* [2021] ZAFSHC 241 at para 21; *Engen Petroleum Ltd v Jai Hind EMCC t/a Emmarentia Convenience Centre* [2024] ZAGPJHC 1098 at paras 46 and 50-64; and *Habib Overseas Bank Ltd v Crestar Printers and Publishers (Pty) Ltd* [2024] ZAGPJHC 1113 at para 73. See also *Blakes Maphanga Inc v Outsurance Co Ltd* [2010] ZASCA 19; [2010] 3 All SA 383 (SCA); 2010 (4) SA 232 (SCA) at para 18, where it was said that "[t]he question whether a debt may be capable of speedy ascertainment is 'a matter left for determination to the individual discretion of the Judge'".

⁵⁹ *Mankayi* above n 15.

⁶⁰ *Jiba* above n 16.

⁶¹ *Paulsen* above n 11 at para 62; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) BCLR 28 (CC); 2016 (1) SA 621 (CC) (*Mighty Solutions*) at para 20.

⁶² *Paulsen* id at paras 29-30.

⁶³ Id.

Whether the interests of justice require this Court to consider developing the common law

[62] This Court must, therefore, consider whether it is in the interests of justice to develop the common law regarding the application of the *in duplum* rule in claims arising from the statement and debatement of account process. The “interests of justice” standard is elucidated in *Paulsen*, where this Court clarified that its extended jurisdiction will only be engaged if, having determined that there is an arguable point of law of general public importance, the Court finds that it is in the interests of justice to entertain the legal question.⁶⁴ Even where a matter raises a constitutional issue, “[a] litigant is not entitled, as of right, to insist that their matter be heard by this Court on the basis of jurisdiction only, absent the interests of justice”.⁶⁵

[63] Whether the interests of justice favour entertaining a matter – either for purposes of leave to appeal if it is a constitutional matter or for purposes of general jurisdiction if it is not a constitutional matter – requires the balancing of several factors, including but not limited to: (a) prospects of success;⁶⁶ (b) the importance and complexity of the issues raised;⁶⁷ and (c) the position of the parties in society.⁶⁸ Prospects of success are an important aspect in considering the interests of justice, and Grancy must show that there are reasonable prospects that this Court will materially alter the decision of the SCA or reverse it.⁶⁹

⁶⁴ *Id.*

⁶⁵ *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 46.

⁶⁶ *Boesak* above n 18 at para 12.

⁶⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) at para 11 and *Merifon (Pty) Ltd v Greater Letaba Municipality* [2022] ZACC 25; 2022 (9) BCLR 1090 (CC) (*Merifon*) at para 36.

⁶⁸ *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 116 and *Merifon* *id.*

⁶⁹ *Boesak* above n 18 at para 12.

[64] Even if Grancy can show that there are reasonable prospects of success, the importance and complexity of an issue militates against this Court being a court of first and final instance to pronounce on it.⁷⁰ The general rule is that the more important and complex the issues are, the more this Court should frown upon considering the issues without having the benefit of the views of lower courts. This finds relevance in this case as the lower courts held that Grancy had not made out a case for the development of the common law, and they did not even attempt to develop it, holding that Grancy seeks a complex development of the law, which is best left to the Legislature.

[65] The High Court concluded that there were insufficient grounds to depart from the long line of authorities and relax the *in duplum* rule. With regard to Grancy's suggestion of the implementation of a bifurcated approach, the High Court held that there is no authority for this novel approach. The SCA was more emphatic in declaring that the *in duplum* rule is a settled legal principle that has been carefully and deliberately developed by the Legislature. Further to this, the SCA stated that it is for the Legislature to undertake any further complex law reform. In agreement with the High Court, the SCA determined that there is no authority cited by Grancy for the bifurcated interest regime that it proposed.

[66] I proceed to address the following: (i) that the development of the common law was not pleaded in the High Court; (ii) that Grancy's proposed development is untenable and; (iii) the judgment of the High Court in *Da Cruz*,⁷¹ that was brought to this Court's attention by counsel for Grancy during oral argument, which may have a bearing on this case.

⁷⁰ *Mkontwana* above n 67 at para 11.

⁷¹ *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ).

The development of the common law was not pleaded in the High Court

[67] Although argument was heard in the High Court and the SCA, the development of the common law was not pleaded. Grancy, relying on this Court’s remarks in *Mighty Solutions*⁷² citing the minority judgment in *Everfresh*,⁷³ argues that this Court may develop the common law as a court of first and final instance, provided that it is not unfair or prejudicial to determine the issue based on the pleaded and established facts.⁷⁴ Grancy submits that there is no prejudice or unfairness in determining the issue based on the papers and arguments before this Court.

[68] The reasons advanced by Grancy to support its argument that it would not be prejudicial to develop the common law are that: (i) the Gihwala respondents were “well aware” of the case they had to meet and delivered comprehensive rebuttal arguments; (ii) the fact that the development of the common law was not pleaded is not fatal, and in the context of this matter a finding that it is fatal would be placing form over substance; (iii) there was no reason for the particulars of claim to include the development of the common law as that is a matter of legal argument – the right time to ventilate legal arguments in support of the relief sought was in the heads of argument; and (iv) importantly, the Gihwala respondents were afforded a full opportunity to engage with the common law development sought and the reasons therefore, and they filed detailed submissions and presented oral arguments in both lower courts.

[69] Unsurprisingly, the Gihwala respondents advance a completely opposite view. They emphasise the point that the development of the common law ought to have been pleaded before the High Court. In making this point, the Gihwala respondents refer to this Court’s judgment in *Fick*,⁷⁵ where Jafta J said that:

⁷² *Mighty Solutions* above n 61 at para 42, citing Yacoob J’s minority judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

⁷³ *Everfresh* id at para 27.

⁷⁴ *Mighty Solutions* above n 61 at para 43, citing *Everfresh* id.

⁷⁵ *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

“[T]he jurisprudence of this Court illustrates that the Supreme Court of Appeal has the expertise and that it and the high courts are best placed when it comes to the development of the common law. This is demonstrated by the following principles: First, *the development of the common law must be pleaded or requested at the earliest possible stage*; ordinarily where the development has not occurred in the Supreme Court of Appeal and the high court, this [C]ourt remits the case to those courts; *except in special circumstances, this [C]ourt refuses to develop the common law as a court of first and last instance*; the views of the other courts on the development of the common law are highly valued by this [C]ourt; this [C]ourt defers to the Supreme Court of Appeal and the high court to determine whether the common law needs to be developed to meet the objects of section 39(2) of the Constitution and if so, the form that development should take.”⁷⁶ (Emphasis added.)

[70] In *Everfresh*, which is referred to in *Fick*, this Court stated that, in the ordinary course, where a party seeks to invoke the court’s power to develop the common law in line with section 39(2) of the Constitution, that case must be pleaded “in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it”.⁷⁷ Another reason why a party should plead their case in the court of first instance is to afford the High Court and the SCA “the opportunity to help shape the common law . . . in line with the normative grid of the Constitution”.⁷⁸

[71] It goes without saying that, in the absence of pleading the development of the common law in the High Court, the respondents were not forewarned of the case they had to meet. They were confronted with that case during argument. Further, the High Court declined to develop the common law and so did not shape the development in any way. What remains to be determined are two questions: the first is whether there are any special circumstances justifying this Court developing the common law as a court of first and last instance; and the second is whether, notwithstanding the failure to

⁷⁶ Id at para 104 and the cases cited therein.

⁷⁷ *Everfresh* above n 72 at para 52.

⁷⁸ Id.

plead the development of the common law, there would be no prejudice in this Court determining the issue as a court of first and last instance.

[72] It must be mentioned that *Mighty Solutions*, which Grancy relies on for arguing the latter, recognises that (i) the majority in *Everfresh* held that what was important was establishing special circumstances that would justify this Court being a court of first and last instance in developing the common law;⁷⁹ and (ii) it was the minority in *Everfresh* that held that, notwithstanding the failure to plead the development of the common law, the question is whether it would be unfair and prejudicial for this Court to determine the issue as a court of first and last instance.⁸⁰ This Court is not bound by the minority judgment. That said, I must point out that although the majority in *Everfresh* found the crucial question to be whether special circumstances had been established, the majority did consider the issues of unfairness and prejudice.

[73] It is important to heed the Gihwala respondents' submission that Grancy's failure to plead the development of the common law has the consequence that the factual matters that would be relevant to its development (including, for example, the reasons for the delays in Grancy's various claims and the length of each such period), were not canvassed in evidence. Grancy argues that this is a matter of legal argument.

[74] In *Everfresh*, the majority declined to develop the common law as a court of first and last instance, inter alia, on the following bases:

“Everfresh has to establish special circumstances that would justify this Court being a court of first and last instance in a matter that implicates the development of the common law of contract. It has not done so. . . . If we were to accept Everfresh's invitation to adapt the common law, Shoprite would be obviously prejudiced. It would be confronted with a change of front at a very late stage in the proceedings. If these matters were raised in good time, Shoprite would have had the opportunity to meet them head on by perhaps tendering evidence or advancing new arguments or adapting

⁷⁹ *Mighty Solutions* above n 61 at para 40.

⁸⁰ *Id* at para 42.

its contentions. . . . Everfresh has not advanced any reason at all for its omission to plead its case fully and earlier than in this Court and for its ever-changing defences to the eviction claim. This is a commercial dispute of considerable monetary value in which the parties were legally represented before and during litigation in all the courts including this one. Everfresh has not suggested that it lacked proper legal representation or that it was poorly advised or indeed that it suffered from any form of vulnerability springing from an unequal bargaining position. Moreover, Everfresh has not pleaded any dire consequences, commercial or otherwise, that might ensue if the lease were not renewed.”⁸¹

[75] As stated above, the Gihwala respondents take issue with the fact that the development was not pleaded and thus factual matters relevant to its development were not canvassed in evidence.

[76] I am not persuaded by Grancy’s submissions for this Court to develop the common law as a court of first and last instance. Primarily, this is because the development was not pleaded. This is fundamental. Grancy has provided no cogent reason why it failed to plead the development of the common law in the High Court. The attempt to explain this failure by suggesting that this is a matter of legal argument and that the right time to ventilate legal arguments in support of the relief sought was in the heads of argument, is misconceived. Case law is clear that “the development of the common law must be pleaded or requested at the earliest possible stage”.⁸² The proper pleading of the development of the common law was important in the present case not only in relation to the question whether there was a need to develop the common law at all but also in relation to the precise formulation of proposed development.

[77] Further, as in *Everfresh*, this is a commercial dispute of considerable monetary value. The parties were at all times legally represented, including in all various litigation processes in the years predating this current matter.

⁸¹ *Everfresh* above n 72 at paras 64-6.

⁸² *Fick* above n 75 at para 104.

[78] For the reasons stated above, it is my view that the development of the common law by this Court as a court of first and last instance would be prejudicial to the respondents and no cogent reason has been provided for the failure to plead the development of the common law. Furthermore, there are no special circumstances that would justify this Court developing the common law as a court of first and last instance and this means that it is not in the interests of justice to do so.

Grancy's grounds advanced for the development of the common law

[79] Even if this Court were to entertain the development of the common law argument, Grancy advanced tenuous grounds for the proposed development. Grancy contends that, without an account, in circumstances where a debtor is obliged to furnish one, a creditor may be unable to advance its claim, potentially for years, as evidenced in this matter. Grancy contends that it is thus creditors rather than debtors who require some form of protection in this regard, or at least a proper balance must be struck. I can do no better than to refer to the sentiments expressed by this Court in *Paulsen*:

“Suspending the *in duplum* rule is not the only possible way of ameliorating a creditor’s situation. Vexatious litigation or delaying tactics by a debtor who truly has no defence may, for example, be addressed by means of summary judgment. Even mechanisms such as punitive costs awards exist to counteract reprehensible behaviour on the part of a litigant. While some unscrupulous debtors may employ meritless defences in an attempt to stretch out litigation for as long as possible, it does not make sense for this to continue after the judgment of the court of first instance has been handed down. That is so because the judgment debt will be due – and ordinarily attracts interest – from the date of judgment of the court of first instance. This should serve to limit the amount of undue harm to be suffered by lenders.”⁸³

[80] Grancy suggests a “simple and narrow” development of the common law, which is anything but simple and narrow. The suggestion is that “where a debtor owes a duty

⁸³ *Paulsen* above n 11 at para 84.

to account, interest for the period before a suitably adequate and accurate account is rendered should not be subject to any *in duplum* limitation”. The issue is at what point could any creditor be certain that a full account has been provided? The suggestion by Grancy places the creditor in a potentially abusive position, as it can indefinitely allege that it has not been furnished with a full account with no suggestion or discussion of a temperance of this position. The judicial system will be inundated with challenges to suitably adequate and accurate accounts. In *Paulsen*, this Court recognised that the excessive and unfair accrual of interest can bar debtors from accessing justice,⁸⁴ and the proposal by Grancy could have a similar effect. This is not to say that there are no instances where this Court would consider the development of the *in duplum* rule in favour of a creditor, it is to simply say that Grancy has not made out a case for it. Grancy is, in my view, seeking a complex development of the common law which could have potentially serious ramifications for debtors that have not been justified, militating against this Court developing the common law as requested.

[81] As argued by the Gihwala respondents, developing the common law in line with Grancy’s argument would disproportionately arm creditors to the detriment of debtors. This fortifies my view that it would not be in the interests of justice to develop the common law in the circumstances of this case.

The Da Cruz judgment

[82] As mentioned above, the judgment in *Da Cruz* was brought to this Court’s attention for the first time during oral argument and I think that it is prudent to address it for the sake of completeness. The argument is that the operation of the principle outlined in it precludes the need to consider the development of the common law in this instance. Therefore, it requires some consideration.

⁸⁴ *Da Cruz* above n 71 at paras 64-9.

[83] The High Court in *Da Cruz* held that *mora* interest on a liquidated debt should not be subject to the same constraints as interest contractually agreed to.⁸⁵ It reasoned that the *in duplum* rule has been stated to apply to arrear interest on all contracts in which a capital sum owing is subject to a stipulated interest rate.⁸⁶ It distinguished *mora* interest from contractual interest, stating that *mora* interest is “concerned with compensation for loss or damage arising from default by the debtor where no interest is agreed”.⁸⁷ The High Court was also of the view that section 1(1) of the PRI Act provides a discretion to a court, in “special circumstances”, to limit interest payable to a dilatory plaintiff or to allow that interest where the defendant is the reason for the delay.⁸⁸ The High Court held that the PRI Act does not impose an *in duplum* limitation on the recovery of *mora* interest.⁸⁹

[84] Counsel for the Gihwala respondents argued that the decision in *Da Cruz* is wrong because the *in duplum* rule is of general application and is not stated in our law in a way that excludes its application to *mora* interest. Of course, it goes without saying that, if *Da Cruz* was correctly decided, then Grancy’s claims would not be subject to the *in duplum* rule since the interest would be *mora* interest. This, in turn, means that there would be no need to develop the common law. However, I am of the view that this is not the occasion to consider the correctness of *Da Cruz*. I explain why below. On 18 August 2021, after reserving judgment for some time, the High Court delivered judgment on this matter. *Da Cruz* was decided on 10 August 2021. As such, *Da Cruz* would not have been debated in the High Court in this matter. However, the appeal to the SCA in this matter was heard in March 2024. Accordingly, Grancy had an opportunity to rely on *Da Cruz* during that appeal hearing. It did not.

⁸⁵ Id at para 58.

⁸⁶ Id at para 59.

⁸⁷ Id at para 60.

⁸⁸ Id at para 61.

⁸⁹ Id at paras 57 and 60-2.

[85] In this Court, Grancy only relied on *Da Cruz* in oral argument; it did not canvass the case or its reasoning in its pleadings or written submissions. If this Court were to embark on a consideration of the development of the common law, it would first have to decide whether *Da Cruz* was correctly decided, because if that case was correctly decided, a development of the common law in relation to *mora* interest on liquidated contractual debts would not be needed. It is Grancy's own submission, albeit only in oral argument in this Court, that *Da Cruz* was correctly decided, a submission at odds with the need to develop the common law. This Court would have to consider the correctness of *Da Cruz* as a court of first and last instance, in circumstances where it was not pleaded before this Court. This is too important a question of law for this Court to decide without having had the benefit of full argument on the question. It was not foreshadowed in the pleadings, nor in the written submissions; it was only dealt with in a cursory manner in oral argument. Therefore, it is not in the interests of justice for this Court to consider the correctness of *Da Cruz* on this occasion.

[86] In the final analysis, leave to appeal against the SCA's order and judgment regarding the Scharrig investment must also be refused.

Costs

[87] The general principle is that costs must follow the result. In the circumstances, I see no reason to deviate from this principle. Therefore, the applicants must pay the respondents' costs, including the costs of two counsel where so employed.

Order

[88] The following order is thus made:

1. Leave to appeal is refused.
2. The applicants are ordered to pay the first, second and fourth to eighth respondents' costs in this Court, including the costs of two counsel where so employed.

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For the First and Fourth to Eighth
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