

SOUTH AFRICA / JUDGMENT

Wexdent Properties CC v Vishal Junkeeparsad & Company Inc and Another (D6378/2021) [2021] ZAKZDHC 48 (20 December 2021)

[2021] ZAKZDHC 48

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

D6378/2021

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THE

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D6378/2021

In

the matter between:

WEXDENT

PROPERTIES CC

APPLICANT

and

VISHAL

JUNKEEPSAD & COMPANY INC

FIRST RESPONDENT

IVAK

INVESTMENTS (PTY) LTD

SECOND RESPONDENT

JUDGMENT

Chetty J:

[1] The applicant seeks judgment against the first respondent, a firm of attorneys in Umhlanga, KwaZulu-Natal for the amount of R1 556 317,

together with interest and costs on an attorney-client scale. The amount in question, being the proceeds from the sale of an immovable

property belonging to the applicant, is being ostensibly retained by the first respondent in its trust account in circumstances where the first respondent refuses to pay the proceeds to the applicant contending that the latter has failed to comply with the requirements of the Financial Intelligence Centre Act 38 of 2001 ('FICA').

[2] The factual background to the application is largely common cause. The applicant was the owner of a property in La Lucia, Durban from which one of its members practiced as a dentist. The applicant entered into an agreement with the second respondent for the sale of the property in the sum of R1 525 000. It was a term of the agreement that the full purchase price of the property would be paid into the seller's (the applicant's) account prior to registration of transfer. Prior to transfer, the parties changed the firm of attorneys they engaged to attend to the conveyancing. At the request of the second respondent, the first respondent was engaged to be the conveyancing attorneys for the specific transaction between the parties.

[3] On or about 12 October 2018 the purchase price for the property was paid into the trust account of the first respondent, who then requested that the applicant and its members furnish various documents including verification of their residential addresses (not older than three months), as well as a copy of their identity documents. At this stage the applicant's members had moved abroad. The information was requested by the first respondent to enable it 'to proceed with the matter and comply with legislative requirements'. The applicant's members complied with the request by the first respondent towards the end of 2018. On 24 April 2019 the first respondent lodged the transfer documents at the Deeds Registry, with the registration of transfer eventually taking place on 17 October 2019.

[4] Despite the transfer already having taken place, the first respondent wrote to the applicant's members on 31 March 2020 requesting they sign an indemnity, as well as providing certified proof of their latest addresses, as required by FICA. Once this was done, the first respondent undertook to release the payment. The applicant complied with the request for FICA documentation on 9 April

2020. Despite compliance on two occasions, the first respondent had still not paid over the proceeds from the sale.

- [5] For almost a year from February 2020 to March 2021 the applicant corresponded with a member of the first respondent's office who provided a litany of excuses as to why the first respondent was unable to pay the proceeds of the transfer over to the applicant. Eventually, the applicant became exasperated at the reasons being proffered for the delay in payment and referred the matter to its attorney. The latter wrote to the first respondent on 25 March 2021 requesting a final statement of account and demanded that payment of the proceeds of the sale, together with interest, be made to the applicant. Again, the first respondent raised the issue of FICA compliance, apparently alerted by its FICA compliance officer, requesting yet again proof of residence – this time, not older than three months – in respect of the applicant's members. As with previous undertakings, the first respondent promised to make payment once the 'outstanding information' was received. The applicant's attorney again demanded an explanation as to why the proceeds of the sale had still not been paid, despite the applicant having done all that had been requested of it, particularly with regard to the FICA documentation.
- [6] The first respondent replied to the applicant's attorney that the amount of R1 588 306.77 (due to the applicant), was being held in a money market account for the benefit of the applicant. The first respondent provided no further details of the account or institution at which the funds were being held, despite requests from the applicant's attorney.
- [7] The first respondent thereafter addressed correspondence to the applicant's attorney, relying on the provisions of FICA and its regulations to contend that as the holder of an attorney's trust account, it was entitled to request verification of information prior to payment to any individual, in order to safeguard themselves against fraud and theft relating to trust monies. The first respondent expressed its concern over the applicant's reluctance to furnish it with the information requested, and that it remained ready to release the payment on receipt of the requested information. It was also apparent that the first respondent was insistent that documents provided by the applicant should not be older than three months from the date of issue, apparently relying on a provision of FICA for this requirement. In order to avoid further delays and particularly a debate with the first respondent as to his interpretation of the provisions of FICA, the applicant's attorney in order to hasten payment and despite having previously complied, again requested the applicant's members to provide proof of their identity and residence, as well as their signatures to a resolution authorising their attorney to receive payment on their behalf from the first respondent. Again the first respondent raised issues of non-compliance with FICA, which the applicant's attorneys recorded were simply delaying tactics to avoid paying over the proceeds from the sale of property. Not satisfied with the documents signed by the applicant's members, and in particular the resolution authorising its attorney to receive payment of the funds due to it, the first respondent requested that the resolution be signed before a Notary Public or before an official designated to do so, at the South African Embassy in Australia.

[8] The contention on behalf of the applicant, in the face of endless demands for documentation, was that first respondent was misinterpreting the provisions of FICA, and even if it was incorrect in its interpretation, the applicant's members have complied with the

request to furnish all information as required. Moreover, the applicant enlisted the assistance of a conveyancer, Samantha Yvonne

van Rooyen who deposed to an affidavit in which she confirmed that in terms of FICA, the documents requested by the first respondent were required prior to registration of the transfer. In addition, it was contended that the transaction for which the services of the first respondent were engaged, was for a single business transaction, in respect of which there was no contractual engagement beyond that of the transfer and registration of the immovable property belonging to the applicant. In the result, it was submitted on behalf of the applicant that the first respondent has conceivably resorted to delaying tactics in order to avoid paying out the proceeds of the sale to the applicant, and was consequently unlawfully withholding monies which are lawfully due to the applicant. On that basis it was submitted that the retention of monies by the first respondent, for the reasons advanced, are spurious and without foundation in law.

[9] The first respondent's opposition was confined to raising points in limine in which it challenged the authority of the deponent to the founding affidavit, Dr Hogg, to act on behalf of the applicant, which is a separate juristic entity, in the absence of a resolution from its members. The applicant duly responded to the challenge in terms of Uniform rule 7(1) and filed a special power of attorney which authorised Dr Hogg to act on behalf of the applicant, and the applicant's attorneys to act on its behalf. The first respondent further requested an authorising certificate from the

Commissioner of Oaths, entitling him or her to authenticate the affidavit of the deponent under the Laws of Australia. This request

was responded to by the Department of Justice and Attorney-General of Queensland. These points in limine were not persisted with by Mr Naidoo, who appeared on behalf of the first respondent. However, it behoves me to say something in relation to these challenges. It is ironic that the first respondent, whose office has been liaising with the applicant's member, Dr Hogg, for almost two years in relation to the conveyancing transaction and the requests for documents supposedly required in terms of FICA, should later seek to challenge his authority (Dr Hogg's) to act on behalf of the applicant, knowing full well that he was the de facto contact of the applicant's members and also that he had taken up residence in Australia. I find the approach of the first respondent in these circumstances, as a legal practitioner, unbecoming, particularly where an attorney-client relationship exists

with the applicant. These points in limine were without merit and fall to be dismissed.

[10] As to the merits of the application, the first respondent contends that it is neither refusing to pay the applicant the proceeds of the transfer, nor engaging in delaying tactics. It is insistent that the applicant and its members comply with the request for information in terms of

FICA, including the provision of certified copies of their proof of address, identity, as well as banking details. The first respondent furthermore dismisses the view advanced by the practising conveyancer, Ms van Rooyen, that FICA documents and proof of banking details are in the normal course of events provided to a conveyancer prior to registration of transfer. Furthermore, in Ms van Rooyen's opinion, had the applicant and its members not complied with the FICA requirements prior to registration of transfer, the transfer of the property would not have gone through. In her view, the sale of a property as set out in the applicant's founding affidavit, constitutes a 'single transaction' as defined in FICA, requiring the conveyancing attorney to verify the identity of the parties (in this case the applicant and its members), before transfer is registered.

[11] It is pertinent to point out that despite the contention of Ms van Rooyen that the conveyancing transaction constituted a 'single'

transaction and not a 'business relationship' which FICA envisages as a 'regular' or on-going relationship, the first respondent was adamant that conveyancing (being the nature of its mandate in the present matter) constituted a 'business

relationship' rather than a 'single' transaction where there is no expectation of further or on-going engagement

between the client and the accountable institution. On the facts before me, there is no suggestion that the applicants had any

intention of fostering a long-term engagement with the first respondent. Mr Naidoo submitted that conveyancing, by its nature, encompasses an element of time and constant engagement with the client. The reason for taking this line of argument was to bring the transaction under the ambit of a 'business relationship', in my view, is to ensure that an on-going verification exercise of the applicant can be justified, validating the repeated demands made on the applicant by the first respondent. On the other hand, in the case of a 'single transaction', as contended for by Mr van Rooyen, who appeared for the applicant, the verification and identification of credentials takes place at inception – or prior to accepting the mandate to act on behalf of a client. Hence s 21 of FICA refers to a 'prospective client'. Also s 21B refers to a single transaction or the establishment of a business relationship and sets out the compliance requirements when dealing with legal persons. On the other hand, s 21C refers to ongoing due diligence, but crucially, this obligation is limited to an ongoing business relationship. It was submitted by the applicant, correctly in my view, that s 21C(b) contemplates an ongoing verification exercise, but only where there is an established business relationship. I am in agreement with counsel for the applicant that the transaction in question, for the first respondent to attend to the transfer of a property, can be nothing other than a single transaction for the purposes of FICA. To suggest otherwise would be straining the language of FICA, for a purpose that would only suit the first respondent and provide a justification for its demands made on the applicant's members.

[12] During the course of argument, Mr Naidoo also attempted to justify the first respondent's repeated demands for copies of identity and proof of address not being older

than three months. There is nothing in the Guidance Notes issued by the Financial Intelligence Centre that bears reference to such a requirement. While this may have developed into a norm in certain spheres of business, I have not been able to find any authority (nor has counsel for the first respondent referred me to any) that requires an identity document or proof of address to be not older than three months, in order to be valid. What alters the validity of the document a day after three months? I am in agreement with the views expressed by Ms van Rooyen in her affidavit where she asserts that the first respondent's repeated requests for certification of documents not older than three months, is not a requirement imposed by FICA.

[13] The first respondent relies on the provisions of s 21(1) of FICA for its submission that the obligation on the 'accountable

institution' (meaning a person referred to in Schedule 1, including an attorney)[1] to identify its client, extends beyond the verification done at inception of the relationship. According to the first respondent,

this mandatory obligation does not 'abruptly end' after the initial verification and a relationship is established. In this regard, the first respondent submits that s 21B of FICA imposes additional due diligence measures where an attorney is acting on behalf of a trust.

[14] In terms of s 21(1) of FICA, an 'accountable institution' must establish various facts about a 'prospective client'. This must be done 'in the course of concluding' a transaction or establishing a business relationship. This is evident from the language employed in the section wherein reference is made to a 'prospective client' – providing the strongest indication that the identity of the client must be verified before a mandate is concluded. The section reads as follows :

'21. Identification of clients and other persons.—(1) When an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its Risk Management and Compliance Programme

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- (a) establish and verify the identity of the client;
- (b) if the client is acting on behalf of another person, establish and verify—
 - (i) the identity of that other person; and
 - (ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and
- (c) if another person is acting on behalf of the client, establish and verify—

(ii) that other person's authority to act on behalf of the client.' (emphasis added)

[15] To the extent that the first respondent relies on s 21B as giving rise to some on-going due diligence obligation or monitoring standard,[2] it is necessary to have regard to the wording of the section to ascertain whether the first respondent's conduct in refusing to release the proceeds of the sale are consistent with its obligations in the statute. The high watermark of the first respondent's

obligations in terms of s 21B, it seems to me, extend no further than establishing the nature of the client's business (s 21B(1)(a)) and the ownership and control structure of the client, (s21B(1)(b)) if it is a legal person. The section requires of the accountable institution to 'take reasonable steps to verify the identity of the beneficial owner of the client' (if applicable). There is nothing in the scope of s 21B that mandates an accountable

institution to do anything further, and certainly not to bring a commercial transaction to a halt because of non-compliance.

[16] Even where, subsequent to entering into a transaction, the accountable institution has doubts as to the veracity of previously obtained information, it must repeat the steps in s 21 and 21B (that is, establishing the identity of the client, proof of address) in terms of s 21D.

[17] There is nothing in the wording of FICA that supports the first respondent's conduct of withholding payment to the applicant for the reasons it has advanced. It is for this reason that the applicant in its reply contends that the first respondent appears to have 'cobbled' together his own requirements for compliance and due diligence, abrogating to itself a role not envisaged in the legislation.

[18] Moreover, the reliance of the first respondent that in terms of s 21E(1)(c)(ii) he may somehow be permitted not to give effect to a transaction on behalf of a client, is with respect, misplaced. The relevant section provides that:

'21E. Inability to conduct customer due diligence.—If an accountable institution is unable to —

(a) establish and verify the identity of a client or other relevant person in accordance with section 21 or 21B;

(b) obtain the information contemplated in section 21A; or

(c) conduct ongoing due diligence as contemplated in section 21C, the institution—

(i) may not establish a business relationship or conclude a single transaction with a client;

(ii) may not conclude a transaction in the course of a business relationship, or perform any act to give effect to a single transaction; or

(iii) must terminate, in accordance with its Risk Management and Compliance Programme, an existing business relationship with a client, as the case may be, and consider making a report under section 29 of this Act.'

[19] On any interpretation of the aforementioned section the first respondent's conduct in withholding payment to the applicant is without foundation. Any steps taken by the accountable institution should be done prior to the establishment of a business relationship or conclusion of a single transaction. It is common cause that in the present matter the first respondent only raised the spectre of FICA non-compliance after the registration of transfer of the immovable property into the name of the second respondent. It is not disputed that no report has been made to the Financial Intelligence Centre ('the Centre'), which is the entity statutorily entrusted to act against a client in the event of a suspicious transaction report or where there has been non-compliance with any of the requirements for verification in terms of s 21. Furthermore, there is nothing on the papers before me, or as may be alleged by the first respondent, that would constitute the 'trigger' for the reporting of the applicant to the Centre as contemplated in s 29. Invoking a report under s 29 is predicated on the first respondent having known or suspected that its:

'(a) . . . business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) a transaction or series of transactions to which the business is a party—

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;...'

The first respondent's affidavit is significantly silent as to any allegation that would bring the applicant or its members within the ambit of activities that include money laundering or the financing of terrorist and related activities.

[20] To the extent that the first respondent contends in the counter-application that the applicant is obliged to comply with his request to re-submit all documents to enable him to verify the identity and proof of residence of the applicant's members (as set out in paragraph 3 of its email to the applicant's attorneys dated 7 April 2021), the applicant contends that it has complied with the requirements of FICA on no less than three occasions, and that even if it did not, there is no justification in FICA which entitles the first respondent to withhold the payment from the sale of its property. In terms of s 33 of FICA, transactions may be continued with despite the making of a report in terms of s 28 (where amounts are above a certain limit) and s 29 (property associated with terrorist activities).

‘33. Continuation of transactions.- An accountable institution, reporting institution or person required to make a report to the Centre in terms of section 28 or 29, may continue with and carry out the transaction in respect of which the report is required to be made unless the Centre directs the accountable institution, reporting institution or person in terms of section 34 not to proceed with the transaction.’ (emphasis added)

[21] In terms of s 34, it is only if the Centre has reasonable grounds to suspect a transaction involves, inter alia, the proceeds of unlawful activities or property, that it may direct the accountable institution in writing not to proceed with the transaction, but for a period not longer than ten (10) days, to allow it to investigate the matter. Even on the assumption that the first respondent had reasonable grounds to suspect that the applicant or its members were engaging in suspicious conduct or activity, on the wording of s 34, it has no authority to halt or interrupt a transaction. Even if it did, which is patently inconsistent with the most generous interpretation of s 34, this interruption could not have lasted for more than ten (10) days. In the present matter, the first respondent through its unilateral actions, has halted payment to the applicant since October 2019 when transfer of the property was registered. On that basis, roughly 720 days would have passed and the first respondent has still not paid over the proceeds from the sale to the applicant.

[22] In *Ospoort Boerdery CC and Another v Freyson Attorneys and Another* (15637/2018) [2018] ZAGPJHC 696 (13 November 2018) the court interpreted s 34 to the effect that a firm of attorneys was found to only be permitted to withhold a deposit of money made to it if the Centre directed it to. In that case the firm of attorneys refused to repay a deposit to the applicant after it reported the matter to the Centre in terms of s 29. The attorneys maintained that they were entitled to retain the deposit pending a directive issued by the Centre authorising payment to the client. One of the purposes of intervention by the Centre is to prevent the dissipation of funds or property which may be the proceeds of unlawful activity. No such allegation is made by the first respondent in the matter before me. In concluding that the attorneys in *Ospoort Boerdery* had no authority to demand a directive from the Centre to intervene (s 34), and that the retention of monies by the attorneys could not be sustained, the court relied on *South African Petroleum Energy Guild (NPC) v RMB Private Bank* (2014/27890)

[2014] ZAGPJHC 368 (5 December 2014), where a bank had frozen funds on suspicion that the funds were the proceeds of illegal activity. The bank contended that its right to do so arose from a tacit or implied term that it was entitled to freeze funds on suspicion that the funds were the proceeds of illegal activity, and that it had certain duties that included refraining from allowing its facilities for being used for unlawful means. Sutherland J held that no such duty arose from FICA, and said:

‘[28] . . . the term sought to be imputed and its radical intrusion on the rights of a client far exceed what FICA authorises the Centre to do. What is sometimes overlooked is that even criminals have rights; the more basic of which is to be convicted before being punished. . . .

[29] . . . the respondent claims a term that entitles it to freeze R5 million of a business for over five months, and further claims it may continue to do so until the applicant convinces a court that the bank's belief in its wickedness is unreasonable. In my view to imply such a term is untenable.'

[23] In Houtbosplaas (Pty) Ltd and another v Nedbank Limited [2020] JOL 46663 (GP), Nedbank (which, being a financial institution is also an 'accountable person' in terms of FICA) restricted access to an account on the basis that its client allegedly failed to provide it with the necessary documents to allow the bank to identify

it in terms of FICA. The court, in paragraph 21, held that this was simply not permissible:

'A business relationship between a financial institution and a customer does not entitle the former to restrict or freeze access to the account of the latter, even in instances where there is a suspicion that the transaction involves unlawful activity. Section 29 of FICA provides for suspicious and unusual transactions. That would include transactions relating to offences such as money-laundering or money used to further terrorist activities or those that appear to be involved in unlawful activity. The courts have frowned upon the freezing of accounts even in more serious cases w[h]ere unlawful activities or a suspicion thereof was conducted in those accounts. It is common cause between the parties that the identity verification in this case had absolutely nothing to do with unlawful activity or a suspicion thereof conducted in the applicants' accounts.' (emphasis added).

[24] The essence of Mr van Rooyen's argument on behalf of the applicant is that the first respondent has misinterpreted the provisions of FICA as to the extent of his obligations under the statute. He is not a policing agent assuming responsibility for compliance with the provisions of FICA. As I have stated earlier, the first respondent's duty of verification of the personal details of the applicant and its members was to take place prior to accepting the instruction to act as conveyancing attorney. At the very least, this verification exercise must be completed 'in the course of concluding that single transaction or establishing that business relationship' (s 21). The applicant's members in any event say that they have complied with the FICA requirements, asked of them three times over. FICA provides that where a client fails to comply with the requirements set out therein, an accountable institution (such as an attorney) may refer the matter to the Centre for further steps to be taken pursuant to the provisions of Part 3 of FICA. FICA confers no powers on an accountable institution in the face of a recalcitrant client. That duty to ensure compliance is passed on to the Centre. Section 33 of FICA provides:

'An accountable institution, reporting institution or person required to make a report to the Centre in terms of sections 28 or 29, may continue with or carry out the transaction in respect of which the report is required to be made unless the Centre directs the accountable institution, reporting institution or person in terms of section 34 not to proceed with the transaction.' (emphasis added)

[25] Section 33 makes it clear that it is the Centre and not the accountable institution that determines whether the latter may

proceed to continue with the transaction. See Guidance Note 4 on Suspicious Transaction Reporting, GN 301, GG 30873, 14 March 2008 issued by the Centre. The role of an accountable institution, or attorney as in the present matter, who over-steps the mark, is perhaps best described by Sutherland J in *South African Petroleum* in paragraph 27:

‘It seems to me that the obligations of a bank to initiate action about money laundering are wholly regulated by statute. There is no space, and indeed no need that is discernible in this regard, to imply additional duties on the bank ... The respondent’s role in combatting money laundering is already spelt out in the legislation: in essence to be vigilant about possible unlawful activity and report it when it is noticed and if lawfully instructed to put a hold on funds, to do so. There is no scope to develop a role for what would be a cousin of the *Lex Commissoria* to add to the battalions arrayed against rich crooks.’

[26] Borrowing the phrase used in *South African Petroleum* in paragraph 30, Mr van Rooyen submitted that the reality is that the first respondent ‘is not the sheriff in a frontier town.’ He has no powers, under the common law or statute, to retain the proceeds of the sale or to refuse to account to the applicant where precisely such monies were invested and what rate of interest has accrued thereon. I am not persuaded by Mr Naidoo’s retreating submission that if I find that the first respondent was not entitled to act as he did, I should nonetheless find that he acted ‘innocently’ and this could be traced back to a misinterpretation of the provisions of FICA. The conduct of the first respondent in refusing to pay the proceeds due to the applicant is a deliberate and considered act. He was alerted by the applicant’s attorneys to his misinterpretation of the provisions of FICA. He was adamant that he was entitled to act as he did. Even at that late stage it would have been open to the first respondent to have sought guidance from the Centre as to whether his own conduct, as an accountable institution, was consistent with FICA. He did not do so. Instead, he rode roughshod over the rights of the applicant to receive payment without delay once transfer had been registered into the name of the second respondent. It is noteworthy that one of the purposes of intervention by the Centre is to prevent the dissipation of funds or property which may be the proceeds of unlawful activity. No such allegation is made by the first respondent in the matter before me. The first respondent’s conduct in placing obstacles in the path of the applicant from being paid out the proceeds from the sale, ostensibly in the name of compliance with FICA, is worrisome. It smacks, in my view, of conduct designed to delay payment and accountability by an attorney to its client.

[27] I turn now to the involvement of the second respondent in this matter, in circumstances where no relief is sought against it by the applicant in its notice of motion. The second respondent was merely cited as an interested party, inasmuch as it was the purchaser of the property which belonged to the applicant. It is not in dispute that the second respondent duly paid the full purchase price for the immovable property, and acted at all times in compliance with the agreement of purchase and sale. Upon receipt of the application

papers, the second respondent filed a notice to abide by the decision of the court in respect of the relief sought by the applicant in paragraphs 1 and 2 of the notice of motion. The second respondent however chose to file a detailed affidavit, ostensibly in order to place 'all relevant facts before the court', as it was 'shocked' upon being served with a copy of the papers by the Sheriff of this court. Propelled by this state of shock, the second respondent proceeded to contact an employee in the office of the first respondent to enquire why the purchase price had still not been paid over to the applicant. The second respondent then proceeded to offer a commentary on the prejudice which has befallen the applicant, and laments the conduct of the first respondent in not paying over the proceeds of the sale.

- [28] I found the content of the affidavit by the second respondent to be misplaced and simply burdensome given the length of papers that had to be considered by this court in determining the issue between the parties. The second respondent seems to be desirous of involving itself in litigation which does not concern it. Mr Manikam who appeared on behalf of the second respondent submitted that the second respondent was surprised when it discovered that the money which it had paid pursuant to the purchase and sale agreement for the immovable property, had still not been paid over to the sellers (the applicant) despite a significant lapse of time.
- [29] The first respondent took issue with the allegations levelled against him by the second respondent, contending that its affidavit contains averments which are scandalous, vexatious or irrelevant. It is unclear what may have generated the animosity between the first and second respondents. Whatever the cause of that animosity, I am satisfied that it is not a matter which requires this court's attention, and does not in any way contribute to the resolution of the dispute which is before me. The first respondent submits that the affidavit of the second respondent be struck out with costs. Undeterred, the second respondent filed an answering affidavit in response to the affidavit of the first respondent, in circumstances where none was strictly necessary. It appears to me that the second respondent was desperate to immerse itself in the litigation between the applicant and the first respondent, even though no relief is sought against it. The deponent to the second respondent's affidavit, Dr Naidoo, bemoans the fact that he has been forced to engage attorneys despite his intention not to become involved in the litigation. In my view the second respondent has shown the propensity to be a legal busybody. It has no interest in the litigation, and the issues raised its affidavits are nothing more than a sideshow or distraction. Counsel for the second respondent submitted that if the applicant is successful, costs should be awarded in favour of the second respondent, to be paid by the first respondent. Counsel for the applicant submitted that the court should not strike out the affidavits of the second respondent, as its allegations are indicative of the true facts in the matter, albeit fuelled by some underpinnings of animosity towards the first respondent. As stated earlier, the averments by the second respondent did not contribute anything towards the resolution of the dispute before me, save that in his heads of argument, Mr Manikam referred to the decision of *Houtbosplaas (Pty) Ltd and another v Nedbank Limited* [2020] JOL 46663 (GP) as providing guidance for the interpretation of the material provisions of FICA which occupies

the attention of this court. The remainder of the written submissions are devoted to supporting the position of the applicant.

[30] Counsel for the applicant sought attorney-client costs against the first respondent, submitting that the latter has misinterpreted the provisions of FICA, deliberately or otherwise, resulting in a significant delay of almost two years for the payment of the proceeds of the sale to be paid over. It was submitted by counsel that punitive costs should be awarded against the first respondent based on its intransigent approach to the request made on behalf of the applicant to release the monies flowing from the transaction. Indeed, as set out above, there was no basis in law for the first respondent to have halted payment of the amount due to the applicant.

[31] The extraordinary lengths that the first respondent has put the applicant's members through, supposedly on the basis of ensuring compliance with FICA, would suggest an element of nastiness. Its request had no foundation in law and led to unnecessary

litigation, which could have been averted. Over and above any of the concerns expressed by the first respondent as to FICA compliance, a significant factor in determining costs is that there has been no suggestion whatsoever that the applicant's members have been engaged in any suspicious conduct which would cause the first respondent to have responded in the manner in which it did. In the circumstances, I am satisfied that the conduct of the first respondent warrants a punitive order of costs. I however am not persuaded that the second respondent is entitled to benefit in relation to costs from the applicant's success. I also am of the view that the conduct of the first respondent warrants the attention of the Legal Practice Council, KwaZulu-Natal.

[32] In the result I make the following order:

- (a) the first respondent is ordered to pay the applicant the sum of R1 556 317.00, together with such interest as may have accrued thereon from such sum being held in a trust investment banking account for and on behalf of the applicant, together with all interest accruing thereon until date of final payment;
- (b) the first respondent is directed to pay the applicant's costs of this application on an attorney-client scale;
- (c) a copy of this judgment is referred to the Legal Practice Council (KwaZulu-Natal) for consideration insofar as the conduct of the first respondent is concerned.

M R CHETTY

Appearances

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Instructed by:

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Date of Judgment reserved: 28 October 2021

Date of delivery:

20 December 2021

[1] In terms of Schedule 1 an accountable institution includes a ‘practitioner who practices as defined in section 1 of the

Attorneys Act, 1979 (Act No. 53 of 1979)’.

[2] ‘21B. Additional due diligence measures relating to legal persons, trusts and partnerships.—

(1) If a client contemplated in section 21 is a legal person or a natural person acting on behalf of a partnership, trust or similar arrangement between natural persons, an accountable institution must, in addition to the steps required under sections

21 and 21A and in accordance with its Risk Management and Compliance Programme establish—

(a) the nature of the client’s business; and (b) the ownership and control structure of the client.

(2) If a client contemplated in section 21 is a legal person, an accountable institution must, in addition to the steps required under sections 21 and 21A and in accordance with its Risk Management and Compliance Programme— (a) establish the identity of the beneficial owner of the client by— (i) determining the identity of each natural person who, independently or together with another person, has a controlling ownership

interest in the legal person; (b) take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows who the beneficial owner is. (3) If a natural person, in entering into a single transaction or establishing a business relationship as contemplated in section

21, is acting on behalf of a partnership between natural persons, an accountable institution must, in addition to the steps required

under sections 21 and 21A and in accordance with its Risk Management and Compliance Programme— (a) establish the identifying name of the partnership, if applicable; (b) establish the identity of every partner, including every member of a partnership en commandite, an anonymous partnership or any similar partnership; (c) establish the identity of the person who exercises executive control over the partnership; (d) establish the identity of each natural person who purports to be authorised to enter into a single transaction or establish a business relationship with the accountable institution on behalf of the partnership; (e) take reasonable steps to verify the particulars obtained in paragraph (a); and (f) take reasonable steps to verify the identities of the natural persons referred to in paragraphs

(b) to (d) so that the accountable institution is satisfied that it knows the identities of the natural persons concerned.

[2] ‘21B. Additional due diligence measures relating to legal persons, trusts and partnerships.—

(1) If a client contemplated in section 21 is a legal person or a natural person acting on behalf of a partnership, trust or similar arrangement between natural persons, an accountable institution must, in addition to the steps required under sections

21 and 21A and in accordance with its Risk Management and Compliance Programme establish—

- (a) the nature of the client's business; and
 - (b) the ownership and control structure of the client.
- (2) If a client contemplated in section 21 is a legal person, an accountable institution must, in addition to the steps required under sections 21 and 21A and in accordance with its Risk Management and Compliance Programme—
- (a) establish the identity of the beneficial owner of the client by—
 - (i) determining the identity of each natural person who, independently or together with another person, has a controlling ownership

interest in the legal person;

.....

- (b) take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows who the beneficial owner is.
- (3) If a natural person, in entering into a single transaction or establishing a business relationship as contemplated in section

21, is acting on behalf of a partnership between natural persons, an accountable institution must, in addition to the steps required

under sections 21 and 21A and in accordance with its Risk Management and Compliance Programme—

- (a) establish the identifying name of the partnership, if applicable;
- (b) establish the identity of every partner, including every member of a partnership en commandite, an anonymous partnership or any similar partnership;
- (c) establish the identity of the person who exercises executive control over the partnership;
- (d) establish the identity of each natural person who purports to be authorised to enter into a single transaction or establish a business relationship with the accountable institution on behalf of the partnership;
- (e) take reasonable steps to verify the particulars obtained in paragraph (a); and
- (f) take reasonable steps to verify the identities of the natural persons referred to in paragraphs (b) to (d) so that the accountable institution is satisfied that it knows the identities of the natural persons concerned.

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