THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 788/2024

In the matter between:

GORR ASSIST (PTY) LTD **APPLICANT**

and

BAYPORT SECURITISATION (RF) LTD
(Successor in title to Bayport Financial
Services 2010 (Pty) Ltd) **RESPONDENT**

Neutral citation: *Gorr Assist (Pty) Ltd v Bayport Securitisation (RF) Ltd* (788/2024) [2026] ZASCA 51 (14 April 2026)

Coram: MOCUMIE, KOEN and BAARTMAN JJA and STEYN and GOVINDJEE AJJA

Heard: 2 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 14 April 2026 at 11h00.

Summary: Appeal – application for special leave to appeal – condonation – whether reasonable prospects of success on appeal – determining factual basis on which magistrates' court concluded that claims had prescribed – whether magistrates' court ruling that claim prescribed in conflict with s 165 of the Constitution – whether high court erred in refusing condonation for late noting of appeal – whether appeal has prospects of success – lack of prospects of success dispositive of applications for condonation and special leave to appeal.

ORDER

On application: for special leave to appeal a decision of the Gauteng Division of the High Court, Johannesburg (Dippenaar J and Goodman AJ, sitting as a court of appeal):

The applications for condonation and for special leave to appeal are dismissed with costs.

JUDGMENT

Koen JA (Mocumie and Baartman JJA and Steyn and Govindjee AJJA concurring):

Introduction

[1] The applicant, Gorr Assist (Pty) Ltd (Gorr), seeks special leave to appeal against an order of the full bench of the High Court of South Africa, Gauteng Division (the full bench) given on appeal to it. Gorr also seeks an order condoning its failure to have pursued the application for special leave before this Court timeously.

[2] The appeal to the full bench was against a judgment of the Magistrates' Court for the District of Johannesburg North, held at Randburg (the Randburg court). The Randburg court held that Gorr's action for payment of R30 838.72 (claim A) and R30 237.73 (claim B) against the respondent, Bayport Securitisation (RF) Ltd (BS), had prescribed. Gorr also sought condonation for its failure to pursue its appeal to the full bench timeously.

[3] The full bench disposed of the appeal by dismissing Gorr's application for condonation. It did so primarily because it was not satisfied that Gorr had reasonable prospects of succeeding with the appeal against the judgment of the Randburg court.

[4] The application for special leave to this Court, which includes whether the lateness of the application should be condoned, has been referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Act).[1] The parties were directed to be prepared, if required, to address the Court on the merits of the appeal.

[5] The issues which arise include:

(a) Whether the full bench erred in dismissing Gorr's application for condonation for its failure to pursue the appeal timeously, specifically whether Gorr had established a reasonable prospect of successfully appealing the Randburg court's order;

(b) Whether Gorr's failure to pursue the application for special leave to appeal to this Court timeously should be condoned;

(c) Whether there are special circumstances present which would warrant special leave being granted; and if so, whether the appeal should succeed.

Central to all the above issues is whether the Randburg court was correct in determining that Gorr's claims had prescribed. If not shown to have erred, then Gorr could not enjoy reasonable prospects of succeeding with any appeal. That would dispose of the applications for condonation and special leave before this Court.

[6] Regarding prescription, it is common cause that: Mr Letlhogonolo Percy Mothibi (Mr Mothibi), the cedent of the claims which Gorr seeks to enforce, had knowledge of all the facts giving rise to the claims by no later than the end of

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[1] Per Mabindla-Boqwana JA and Unterhalter AJA.

February 2017; the extinctive prescription period applicable to the claims would be three years, as provided in s 11*(d)*[2] of the Prescription Act 68 of 1969; and the summons in the Randburg court action was served on BS on 19 August 2021. Gorr contends, however, that the claims were not enforceable until 14 June 2021 and that the prescriptive period was therefore interrupted by the service of the summons. That enquiry requires an analysis of the factual basis upon which the special plea of prescription fell to be decided. What that factual matrix was is unclear. It received no attention at the time when the Randburg court indicated that it would decide the special plea of prescription separately from the other issues in the proceedings.

The background facts

The separation of the prescription defence

[7] BS raised special pleas of *lis alibi pendens* and prescription in defending the claims instituted by Gorr in the Randburg court. The learned magistrate stated that he was 'going to hear the points *in limine* raised'. As BS did not persist with the *lis alibi pendens* defence, the import of the magistrate's statement was that the special plea of prescription (the special plea) was separated for determination before all the other issues in the trial. The question that should then have arisen is the factual basis on which the special plea should be decided.

[8] The proceedings in the Randburg court took the form of an action. No oral evidence was however adduced. Nor was there an agreed stated case of common cause facts, on the basis of which the special plea would be determined. Before us, counsel were not *ad idem* (in agreement) as to the factual basis on which the prescription defence fell to be decided. Gorr's counsel, who did not appear at the trial before the Randburg court, contended that the special plea was to be decided on

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[2] Section 11*(d)* provides:
'*(d)* save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

the basis of the pleadings and the bundles of documents. Volume 1 of the record before this Court consists of the 'Pleadings' and an incomplete 'Plaintiff's Trial Bundle'. The respondent's counsel, who did appear at the trial before the Randburg court, contended that the special plea proceeded on Gorr's 'pleaded case', as read with BS's plea.

[9] The learned magistrate, in his judgment upholding the special plea recorded that Gorr had handed up a bundle of discovered documents during argument, which he perused for the purposes of preparing the judgment. He listed some of these documents. But there is no recordal in the transcript of the proceedings before the Randburg court as to the status of these documents, that is, whether they simply are what they purport to be, or whether it was agreed that they also served as proof of the contents thereof.

[10] Gorr seemingly accepted the factual matrix against which the plea of prescription was decided by the Randburg court, because it appealed only the merits of that order. The full bench proceeded on the basis that the plea of prescription was determined by the Randburg court on the pleadings and the discovered documents which had been placed before it. In terms of the rules of this Court, the parties had to agree which documents are relevant and should be included in the record which this Court has to consider in deciding the application for special leave to appeal.[3] The record, constituted as a result of that process, contains various documents.

[11] This judgment proceeds on the basis of the allegations in the pleadings and the contents of the documents which have been included in the appeal record, and assumes them to afford proof of the contents thereof. The parties argued the applications on that basis. It is, however, unsatisfactory, as some allegations in the

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[3] Supreme Court of Appeal rule 8, particularly rule 8(8) and (9).

pleadings are inconsistent with the contents of the discovered documents, as will become apparent below, and therefore difficult to reconcile. Any such inconsistencies will be assessed in accordance with the probabilities. Applying this approach, the following material background facts and relevant circumstances have been distilled from the pleadings and documents.

The material facts

[12] Mr Mothibi concluded certain small and intermediate loan credit agreements with Bayport Financial Services (Pty) Ltd (BFS) or Bayport Financial Services 2010 (Pty) Ltd (BFS 2010), from, it seems, May 2009. He defaulted in his obligations in terms of the loan agreements and two actions were instituted against him by BFS during 2010 under case numbers 26633/2010 and 28870/2010 in the Verulam Magistrate's Court (the Verulam court).[4] On 14 and 15 September 2010, Mr Mothibi consented in writing, in terms of s 58[5] of the Magistrates' Court Act 32 of 1944

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[4] The appeal record does not contain copies of the summonses.

[5] Section 58 of the Magistrates' Court Act 32 of 1944 provides in part as follows:

'(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him or her of a summons demanding payment of debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the court may, on the written request of the plaintiff or his or her attorney and subject to subsection (1B)-

(a) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and

(b) if it appears from the defendant's written consent to judgment that he or she has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he or she has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).

(1A) If the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)*(b)*, the consent must-

(a) set out full particulars of his or her-

(i) monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant;

(ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and

(b) indicate the amount of the offered instalment.

(1B) The written request referred to in subsection (1) must be accompanied by-

(a) the summons or if no summons has been issued, a copy of the letter of demand;

(b) the defendant's written consent to judgment; and

(c) if the defendant consents to an order of court for payment in specified instalments referred to in subsection (1) *(b)*-

(i) the written consent; and

(ii) the full particulars and documentary evidence referred to in subsection (1A) in order for the court to be apprised of the defendant's financial position at the time the defendant consented to judgment.

(MCA), to judgments being entered against him in favour of BFS and for emolument attachment orders in terms of s 65J of the MCA to be issued.[6] Pursuant to the consents, two judgments were granted in favour of BFS and emolument attachment orders were issued in favour of BFS on 8 November 2010. Gorr's claims are alleged to arise from the two judgments granted by the Verulam court.

[13] In terms of a written cession dated 7 October 2011 (the cession), BFS 2010, described as the successor in title to BFS, as seller, sold and ceded its right, title and interest in and to its existing and future loan claims to BS as purchaser and cessionary of those loans. The sale was with effect from 30 April 2008.

[14] BFS 2010 and BS are separate companies. The cession annexed to Gorr's particulars of claim in the Randburg court, reflects the registration number of BFS and its successor in title, BFS 2010, as 2009/018403/07, and the registration number of BS as 2008/003557/06.

[15] *Ex facie* (as appears from) the particulars of claim and the annexures thereto, Mr Mothibi allegedly made payments between 31 January 2011 until 21 October 2017 and 31 March 2011 until 25 March 2021, totalling R30 838.72 and R30 237.73

(1C) The court-
(a) may request any relevant information from the plaintiff or his or her attorney in order for the court to be apprised of the defendant's financial position at the time the judgment is requested;
(b) must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act;
(c) may, if the defendant is employed, and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J; and
(d) may, notwithstanding the defendant's consent to pay any scale of costs, make a costs order as it deems fit.
(2) The provisions of section 57 (3) and (4) apply in respect of the judgment and court order referred to in subsection (1) of this section.
(3) The provisions of this section apply, subject to the relevant provisions of the National Credit Act, where the application for judgment is based on a credit agreement under the National Credit Act.'

[6] *African Bank Limited v Additional Magistrate Myambo NO and Others* (34793/2008) [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP) (9 July 2010) at 304F confirmed that a judgment granted in respect of a s 58 consent has the effect of a default judgment.

respectively, in terms of and pursuant to the judgments. The computation of these amounts appears from statements of BS annexed to the particulars of claim.

[16] Mr Mothibi did not reside, nor was he employed in the area of jurisdiction of the Verulam court when he signed the consents and when the judgments were granted. Accordingly, the Verulam court lacked jurisdiction to have granted the judgments against him. It is common cause that the judgments were therefore, in law, void *ab initio* (from the outset). Mr Mothibi became aware that the judgments had been obtained out of the wrong jurisdiction during February 2017.

[17] During November 2017, Mr Mothibi brought an application against BFS to rescind the Verulam court judgments. He did not claim repayment of what he had paid pursuant to the judgments in the rescission application. In both the founding and replying affidavits[7] filed in support of the rescission applications BFS is cited as the respondent. It is alleged by Gorr that the Verulam court, acting in terms of s 36(1)*(b)* of the MCA read with rule 49(8) of the Rules of the Magistrates Court, on 14 June 2021, rescinded the two judgments.

[18] A copy of the rescission order in case number 26633/2010 dated 14 June 2021, is annexed to the particulars of claim. The heading thereto reflects the respondent, against whom the rescission was granted, as BS. Below its name in the heading, a subscript records that it is 'the successor in title to BFS 2010'. The order records that the judgment of 8 November 2010 was rescinded.

[19] No explanation has been provided as to how the applications for rescission against BFS, to rescind orders granted in favour of BFS, resulted in an order against

[7] Curiously, both the founding and replying affidavit are dated 24 November 2017, although the replying affidavit refers to Mr Mothibi having read the answering affidavit of Mr Jaco Dirk Knoetze, which was served and filed on 18 May 2017.

BS, where no judgment was granted, nor alleged to have been granted, in favour of BS. No consents to judgment were signed by Mr Mothibi in favour of BS, no judgment was granted in favour of BS, no emoluments attachment orders were issued in favour of BS, and no application for rescission was brought against BS. Only the rescission order refers to BS.

[20] On 27 July 2021, Mr Mothibi ceded all his right, title and interest in respect of his 'present claim of' R30 838.72 and R30 237.73 that he 'obtained or acquired against [BS and/or BFS 2010]' to Gorr. On 4 August 2021, Gorr issued the summons commencing action in the Randburg court against BS. The summons was served on BS on 19 August 2021.

[21] In its particulars of claim Gorr alleges that BS[8] is the successor in title to BFS 2010. The only basis, appearing from the pleadings and documents, that BS, as a separate corporate entity, can be the successor in title to BFS 2010, is as cessionary of the right, title and interest previously held by BFS 2010 in respect of the loan agreements. BS specifically pleaded that there was no delegation and that it did not assume any obligations of BFS.

[22] Gorr's cause of action, as pleaded in its particulars of claim, is as follows: the judgments of the Verulam court in favour of BFS were void; the payments made by Mr Mothibi pursuant to these judgments were accordingly not due pursuant to a valid court order; the judgments were subsequently rescinded; accordingly restitution should follow; therefore the amounts paid by Mr Mothibi should be repaid to Gorr as cessionary of Mr Mothibi's claims. That this is the basis of its claims was confirmed during argument.

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[8] Bayport Securitisation (RF) Ltd was previously known as Bayport Securitisation (Pty) Ltd.

The judgment of the Randburg court

[23] On 29 April 2022, the Randburg court upheld the special plea of prescription. It reasoned that: the claims did not only arise when the Verulam court judgments were rescinded; the Verulam court in rescinding the judgments had simply confirmed what the legal position was at the time that the judgments were granted, that is that they were void *ab initio*; Mr Mothibi knew all the facts in support of his claims by latest February 2017; a judgment does not create a cause of action but simply confirms that a liability exists; the judgments gave effect to the loan agreements; and, as the summons against BS was served more than four and a half years after Mr Mothibi knew all the facts required to commence proceedings, the claims had prescribed.

[24] The judgment reaffirmed the well-known principle that, for the start of prescription, a debt is not considered due until the creditor knows the identity of the debtor and the facts that give rise to the debt or could reasonably have obtained such knowledge. Additionally, understanding the legal conclusions to be drawn and legal remedies that may result from the facts is not necessary before prescription begins to run.

[25] The judgment considered various causes of action which could arise from the facts: the *condictio indebiti*; the *condictio sine causa*; and restitution. In its analysis of 'the papers filed and arguments advanced', the judgment concluded: that BFS had obtained the judgments against Mr Mothibi in the Verulam court; in consequence of these two judgments BFS received certain payments; the payments could be claimed in terms of the emolument attachment orders issued in the Verulam court; that whatever payments were made were due in terms of the underlying loan agreements; and the payments by Mr Mothibi were not made *indebiti* (not being owed) because they were legally due in terms of the loan agreements. The judgment further

concluded that it was unclear as to what Mr Mothibi obtained or acquired against BS and when this was obtained. Having regard to the agreements concluded by Mr Mothibi and BFS 2010 it could not be disputed that Mr Mothibi owed the money and the money would have to be paid in any event in terms of the agreements. The payments were accordingly not made without any legal obligation, as they were due and were made pursuant to the terms of the underlying loan agreements.

[26] Mr Mothibi had acknowledged his liability to BFS when he signed the consents to judgment. He was required to make the payments in terms of the underlying loan agreements. He had not sought to impeach the consents. The consents were provided without reservation and acknowledged that he was in breach of the underlying agreements. The Verulam court judgments did not create a new legal obligation but, the issue of the voidness of the orders aside, simply served to confirm an extant legal indebtedness and facilitated enforcement of Mr Mothibi's loan obligations, insofar as may be required.

The appeal to the full bench and condonation

[27] Gorr resolved to appeal the decision of the Randburg court. On 6 April 2022, it requested the transcript of the proceeding in the Randburg court. Follow-up requests for the transcription were made from 29 April 2022 until 20 May 2022, without initial success.

[28] An appeal against a magistrate's decision is prosecuted within sixty days of noting the appeal, failing which the appeal shall lapse.[9] Gorr served its rule 51(3) notice on BS on 27 May 2022. It failed to file the record of the proceedings before the Randburg court within twenty days after the date of the judgment appealed against. The transcript of the proceedings in the Randburg court was received on 3

[9] Rule 50(1) of the Uniform Rules of Court.

August 2022. The appeal lapsed in terms of rule 50(1). Gorr does not dispute that its notice of appeal was delivered late but maintains that this was beyond its control.

[29] Gorr had to apply for condonation for the late delivery of the notice of appeal. It did not do so, contending that the appeal was properly noted on 27 May 2022. That was the date it was served on BS's attorneys, but it had not yet been filed with the Registrar. That only happened on 2 June 2022.

[30] BS delivered a rule 6(5)*(d)*(iii) notice in opposition to the application for condonation. It contended that: Gorr had not shown good cause for the delay; no proper reason was provided why the appeal was not timeously prosecuted; the appeal had lapsed; and no application for reinstatement had been made. Gorr submitted that condonation should be granted in the best interest of justice and that the special plea of prescription should be dismissed.

[31] The appeal was heard by the full bench on 31 January 2024. The full bench did not determine the appeal on its merits. It remarked, in relation to the application for condonation, that BS's contention that Gorr had not advanced a satisfactory explanation for its delay, had merit. But it concluded that: ultimately, the appeal had no reasonable prospects of success on appeal; the appeal was doomed to fail on its merits; and that the lack of prospects of success on appeal was dispositive of the application for condonation. It dismissed the application for condonation for that reason, with costs.

[32] In dismissing the application for condonation, the full bench exercised a discretion. The test for appellate interference with a discretion was referred to by the

Constitutional Court in *Florence v Government of the Republic of South Africa*[10] as follows:

'The power of an appellate court to interfere with the exercise of a discretion by a court *a quo* is not without restraint. It is limited by whether the discretion of the court in issue is discretion in the strict sense, sometimes called a strong or true discretion.'

Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.

[33] There is no basis to interfere with the full bench's exercise of its discretion in remarking that there was merit in the submission that Gorr had not advanced a satisfactory explanation for its delay. But strong prospects of success may excuse a weak explanation of delay.[11] Whether the full bench's decision that there were no reasonable prospects of success on appeal, warrants interference, shall be considered below.

The appeal to this Court and condonation

[34] The judgment of the full bench was delivered on 21 February 2024. On 13 July 2024, Gorr applied to this Court for special leave to appeal against the decision of the full bench.

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[10] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 111.

[11] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BLLR 465 CC; 2000 (2) SA 837 (CC) para 3.

[35] Gorr failed to file its application for special leave timeously. Accordingly, the application for special leave to this Court lapsed. Gorr applied for condonation. Gorr's prospects of successfully appealing are important also in deciding whether this Court should condone its failure to file its application for special leave timeously.

Discussion

[36] Gorr's case on prescription is that any action for recovery of the monies paid could not be instituted until the judgments of the Verulam court were rescinded, because it could not reclaim what was paid, while court orders which required such payments to be made, were extant. Accordingly, that prescription only commenced to run once the rescission orders were granted. Reliance was placed on s 12(2) and s 12(3)[12] of the Prescription Act 68 of 1969.

[37] The aforesaid proposition contains a conceptual flaw. It fails to recognise that the court orders requiring payment were in law void *ab initio*. Gorr's attack on the judgment of the Randburg court also fails to have regard to other trite principles applicable to prescription.

The commencement of the prescription period

[38] Prescription commences to run as soon as a debt is due.[13] In *Links v Department of Health* (*Links*),[14] the Constitutional Court, held that:

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[12] Section 12 of the Prescription Act 68 of 1969 in part provides:
'(1) Subject to the provisions of subsection (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'
[13] Section 12 (1) of the Prescription Act 68 of 1969.
[14] *Links v Department of Health* [2016] ZACC 10; 2016 (5) BCLR 656; 2016 (4) SA 414 (CC) para 17.

'a "debt due" means a debt, . . . which is owing and payable, . . . that is, *when the entire set of facts which the creditor must prove* in order to succeed with his or her claim against the debtor is in place . . ..' (Emphasis added)

A debt is not due until the creditor has knowledge of the identity of the debtor and the facts giving rise to the debt, or could reasonably have acquired such knowledge.[15]

[39] Knowledge of legal conclusions to be drawn from the facts, including which remedies may arise, is not required for a debt to become due and for prescription to commence running.[16] In *Van Heerden & Brummer Inc v Bath* (*Van Heerden*),[17] this Court referred with approval to the following passage in *Fluxmans Inc v Levensons* (*Fluxmans*):[18]

'Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in *Gore NO* para 17 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. *The running of prescription is not postponed until it becomes aware of the full extent of its rights* nor until it has evidence that would prove a case "comfortably". The "fact" on which the respondent relies for the contention that the period of prescription began to run in February 2014, is *knowledge about the legal status of the agreement*, which *is irrelevant to the commencement of prescription*. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. *Section 12(3)* of the *Prescription Act requires* knowledge only of

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[15] *ATB Chartered Accountants (SA) v Bongiglio* (648/09) [2010] ZASCA 124; [2011] 2 All SA 132 (SCA) (30 September 2010).
[16] *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA); *Fluxmans Incorporated v Levenson* [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) and *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC).
[17] *Van Heerden & Brummer Inc v Bath* (356/2020) [2021] ZASCA 80 (11 June 2021) para 18.
[18] *Fluxmans* fn 16 para 42.

the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity) (*Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).' (Footnotes omitted.) (Emphasis added)

[40] Whether the debt was due in law; what cause of action should be pursued; against whom the claims should be instituted; whether the Verulam court judgments were void *ab* initio; and whether the Verulam court judgments first had to be rescinded, as Gorr contends, are all questions of law. They are not relevant as to when the running of prescription commenced. Mr Mothibi, as appears from his founding affidavit in support of the rescission of judgment applications, was aware in February 2017 that the monies sought to be reclaimed had been deducted from his salary since about December 2010. His attorneys also advised him in February 2017 of BFS's failure to comply with the applicable legislation, which resulted in the judgments being void *ab initio*.

[41] This Court, when dealing with a similar, although not identical situation in *Auckland Park Theological Seminary v Wamjay Holding Investments (Pty) Ltd*, said:[19]

'The submission by Wamjay and the finding by the high court, that prescription only started to run in 2021 when the Constitutional Court delivered its judgment, is not supported by the facts. Wamjay conflates knowledge of material facts with legal certainty and/ or legal conclusion. The pronouncement of the Constitutional Court in 2021 only settled a legal conclusion to the effect that the rights between UJ and ATS were personal in nature. The letter from UJ's attorney provided all the material facts necessary for Wamjay to establish its debt. While the relationship between ATS and Wamjay might have discouraged them from litigating against each other, *nothing precluded Wamjay from seeking a declaratory order to interrupt prescription.* Thus, by 5 October 2012, action should have been taken to interrupt prescription. I therefore find that, on the said date Wamjay had the entire set of facts it needed to institute its claim against ATS.' (Emphasis added)

This Court concluded:

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[19] *Auckland Park Theological Seminary v Wamjay Holding Investments (Pty) Ltd* [2025] ZASCA 65 paras 19 and 31.

'In my view, the delivery of the judgment of the Constitutional Court in the matter of UJ against ATS and Wamjay did not signal the commencement of the prescription period, same having begun to run on 5 October 2012. On this point alone, the appeal stands to be upheld and the application in the high court had to be dismissed.'

Similarly, in the present matter, the prescriptive period commenced from February 2017. Legal conclusions, such as whether the judgments of the Verulam court were void *ab initio* and first had to be rescinded, were not required to be addressed before prescription would commence.

The claim for restitution against BS

[42] Having taken cession of Mr Mothibi's claims, Gorr elected to claim against BS and to couch its claim as one for restitution based on the invalidity, from the outset, of the Verulam court judgments. That was a deliberate choice of remedy from a range of possible remedies available to it and entailed a conclusion of law. Gorr was required to establish: that the payments reclaimed had been paid by Mr Mothibi pursuant to the Verulam judgments; that the judgments were void *ab initio*, and would entitle it to restitution of whatever was performed pursuant thereto; and that BS received the payments in terms of the void judgments and would therefore be legally obligated to restore such payments.

[43] It is significant at the outset to reiterate that BS and BFS, subsequently known as BFS 2010, are separate and distinct companies. They have separate and distinct registration numbers. On Gorr's pleaded case, BFS 2010 sold and ceded its right, title and interest to the contracts to BS. A sale and cession would not have been required or legally possible, if they were not separate and distinct corporate entities.

[44] It is common cause that the judgments of the Verulam court were, as a matter of law, void *ab initio.* Accordingly, in the ordinary course, restitution of performance made pursuant to the judgments by the parties thereto, should follow.

[45] BS was however not a party to the Verulam judgments. BFS was the plaintiff and execution creditor. The s 58 consents to judgment were signed by Mr Mothibi in favour of BFS. The judgments were granted in favour of BFS against Mr Mothibi. Similarly, the emolument attachment judgments were granted in favour of BFS against Mr Mothibi. The applications to rescind the orders were brought against BFS. There is no evidence that BS ever, somehow, came to be substituted for BFS as a party to the Verulam court judgments.

[46] The only mention of BS in any document relating to the proceedings in the Verulam court is in the copy of a court order dated 14 June 2021. It reflects that an order was granted by the Verulam court, in proceedings between Mr Mothibi, as applicant and BS, as respondent, under case number 26633/2010 on 14 June 2021. The order purportedly rescinded a judgment granted on 8 November 2010.

[47] There is, however, no copy of a court order recording that any judgment was ever granted in favour of BS. The judgment and emoluments attachment order issued under case number 26633/2010 refer to the judgment granted against Mr Mothibi in favour of BFS. In the absence of documentary proof that BS came to be substituted for BFS in case number 26633/2010, this rescission order simply does not have any practical impact. There is no documentation to suggest that BS ever obtained a judgment against Mr Mothibi, or obtained an emoluments attachment order in its favour, pursuant to which payments would have been required to be made to it. The only reasonable inference, at the level of probability, is that there never was any judgment in favour of BS. But regardless, even if there was a rescission of the judgments granted in favour of BFS or BS, this does not affect the finding that the claim of Gorr had prescribed, as will be demonstrated further below.

[48] As regards whether payments made to BS were pursuant to the Verulam court judgments, payments, in terms of the Verulam court judgments, were due only to BFS, not BS. Insofar as reliance might be placed on the cession by BFS 2010 as giving rise to an obligation on the part of BS, as the 'successor in title' to BFS to restore what was performed in terms of the judgment in favour of BFS, the cession was confined to BFS 2010's right, title and interest to the loan agreements. There was no transfer to BS of possible obligations of BFS to restore what might have been performed pursuant to the void judgments. BS acquired rights in terms of the cession, not obligations.[20] There was not a delegation[21] transferring obligations from BFS to BS.

[49] Further, as regards the cession: BS would probably have become entitled to the benefits of the judgments granted on 8 November 2010 against Mr Mothibi in favour of BFS 2010/BFS, by virtue of the cession executed on 7 October 2011. This was however after *litis contestation* had been reached in the actions by BFS against Mr Mothibi. Where a judgment debt is ceded, s 64 of MCA provides that the cessionary must be substituted on the record for the original judgment creditor/ cedent before enforcing the judgment.[22] This Court in *Fisher v Natal Rubber Compounders* said:[23]

'What Nienaber JA said in effect about cession after *litis contestatio* is that the cessionary stepped into the shoes of the cedent, but that the cedent did not lose his locus standi until the cessionary has been substituted . . ..

The cession alone does not transfer the right to prosecute the action to the cessionary. That right only accrues to the cessionary when it is substituted for the cedent as plaintiff. The subject matter

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[20] *Hippo Quarries (TVL) (Pty) Ltd v Eardley* 1992 (1) SA 867 (AD); [1992] 1 All SA 398 (A) at 873E-F. See also *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A).

[21] *Froman v Robertson* 1971 (1) SA 115 (A) at 122E-H.

[22] The section reads as follows:

'**64. Execution in case of judgment**

Any person who has, either by cession or by operation of law, become entitled to the benefit of a judgment debt may, after notice to the judgment creditor, and the judgment debtor, be substituted on the record for the judgment creditor and may obtain execution in the manner provided for judgment creditors.'

[23] *Fisher v Natal Rubber Compounders (Pty) Ltd* [2016] ZASCA 33; 2016 (5) SA 477 (SCA) paras 11-12.

of pending litigation can be ceded freely and fully until *litis contestatio*. Such a right may be ceded subject to one limitation: the cessionary is not entitled subsequently to pursue concurrent litigation in its own name. The corollary is that the cedent may continue the existing litigation in its own name. The cession would not divest the cedent of its locus standi nor vest the cessionary with it unless the court on application permits the substitution of the parties . . .. On substitution, the cessionary can pursue the action in its own name.'

[50] There was no evidence, or even a suggestion, that BS ever applied for and was substituted for BFS as plaintiff and execution creditor in the Verulam court judgments. The payments that were made by Mr Mothibi to BS can therefore not be said to have occurred in terms of the Verulam court orders and were not in discharge of any orders of that court. BFS remained the plaintiff and execution creditor in the Verulam court orders. There is no scope for a restitution claim against BS.

[51] At best for Gorr, payments made by Mr Mothibi to BS might erroneously have been believed to be due in terms of the Verulam court orders, but as a matter of law, the payments to BS could not qualify as performance in terms of the Verulam court orders which fall to be restituted because the judgments granted in favour of BFS were void *ab initio*. Consequently, service of the summons on BS, could not interrupt the running of prescription of the claims for restitution of what had been performed pursuant to the void judgments granted in favour of BFS. Mr Mothibi owed the amounts claimed in terms of the underlying loan agreements. His consents to judgment admitted that much.

Was rescission of the Verulam court judgments required?

[52] Finally, I am also not persuaded that rescission of the Verulam court judgments was a prerequisite to the relief claimed by Gorr, assuming that a claim based on restitution was otherwise competent against BS. Gorr could simply have claimed the return of what was paid pursuant to judgments that were void *ab initio*.

One should not confuse the *de jure* effect of a void act in law, with a situation where a party might dispute that the particular act is void in law. In the latter instance, whether the judgment is void, is simply one of the *facta probanda* in a claim for repayment of what was performed.

[53] Gorr's cause of action is not dependent on the rescission of such a void order. All that is required is that any dispute whether the judgments were void in law, if this was challenged, had to be determined and the judgments be declared to have no force and effect *ab initio*.[24] Legal invalidity, and not necessarily rescission, is the issue. Rescission of the judgments was not required to complete a cause of action against BS. This would also not offend against s 165 of the Constitution, or violate the res judicata principle, two points raised by Gorr.

Section 165(5)[25] of the Constitution and the *res judicata* principle.

[54] Section 165(5) of the Constitution provides that an order of a court is binding on all persons to which it applies. In *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* (*Ndabeni*)[26] the Constitutional Court stated that for an order to be binding, all that is required is that the court in which the order was made must have had jurisdiction. In this case, the Verulam court did not have jurisdiction. Section 165(5) is not implicated. The order would in any event only be

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[24] Nevertheless, if the invalidity of a judgment or order granted by a court lacking jurisdiction is challenged, because the parties do not agree on the status of the impugned judgment or order, then the judgment or order usually will be rescinded, as in *Travelex Ltd v Maloney* [2016] ZASCA 128 para 16.

[25] Section 165(5) of the Constitution provides:

'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

[26] *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3; [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC). The Constitutional Court affirmed in *Ndabeni*, on the facts of that case, that a court order is binding until it is set aside by a competent court, and requires compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. Where an organ of state genuinely believes that an order of court is a nullity, then it has a duty in the public interest to pursue an appeal to correct the illegality. The Constitutional Court drew on the judgments in *Department of Transport v Tasima (Pty) Ltd* and *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma.* It reiterated various important principles including that for an order to be binding, all that is required is that the court in which the order was made must have had jurisdiction.

binding on the persons to which it applies. BS, on what has been placed before this Court, was not a party to the Verulam court orders. The orders did not apply to it.

[55] The doctrine of *res judicata* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. It is founded on public policy, which requires that litigation should not be endless. This Court, in *Prinsloo N O v Goldex 15 (Pty) Ltd*,[27] explained the nature of the *res judicata* plea as follows:

'. . . The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi* (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*[28] . . . and the cases there cited).'[29]

Are there reasonable prospects of success?

[56] In the final analysis, whether condonation and special leave to appeal should be granted depends on whether Gorr has established that there are reasonable prospects of success. In *Ramakatsa and Others v African National Congress and Another*,[30] this Court held that:

'. . . The test for reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be

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[27] *Prinsloo N O v Goldex 15 (Pty) Ltd* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 10-11.
[28] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 159; 2001 (2) SA 232 (SCA) at 239F-H.
[29]See also *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* and Others [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (*Ascendis*) para 111 where it was held '[I]ts strict terms applied when a later dispute involves the same party, seeking the same relief, relying on same cause of action' and *Boshoff v Union Government* 1932 TPD 345.
[30] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31.

remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'[31] (References omitted.)

[57] Gorr, on what is alleged in the record, could not by the service of summons on BS interrupt the prescription of a claim for the restitution of what Mr Mothibi performed pursuant to judgments obtained by BFS. Gorr has not established that it enjoys reasonable prospects of success. This finding is dispositive of the issue of condonation before the full bench, the condonation sought in this Court, and the application for special leave to appeal before this Court.

Special leave to appeal

[58] Even if Gorr had prospects of success on appeal, it had not shown something more to justify special leave to appeal[32] being granted. As this Court said in *Cook v Morrison and Another*:[33]

'The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public.'

[59] As was concluded in *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd*:[34]

'There is no reason why an appellate court should determine any matter arising from the first appeal further. Again, it is trite that where there has been no manifest denial of justice, no important issue

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[31] Ibid para 10.
[32] *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 24.
[33] *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51(SCA) para 8. See *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561 E-F; *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26. See also: *Van Wyk v S*; *Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 21.
[34] *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* (260/2017) [2018] ZASCA 26 (23 March 2018) para 19.

of law to be determined, and the matter is not of special significance to the parties, and certainly not of any importance to the public generally, special leave should not be granted.'

Given that there are no reasonable prospects of success in the contemplated appeal, much less special circumstances, the application does not meet the standard of 'exceptional circumstances'. There will be no manifest denial of justice if the application for special leave is dismissed.

Conclusion

[60] The full bench was correct in refusing condonation. It was not in the interests of justice to grant condonation. There are no special circumstances which would justify the grant of special leave to appeal to this Court.

Order

[61] The following order is granted:

The applications for condonation and for special leave to appeal are dismissed with costs.

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P A KOEN

JUDGE OF APPEAL

Appearances

For applicant:	H P van Staden
Instructed by:	Allis Attorneys, Johannesburg
	EDJ Attorneys Inc., Bloemfontein
For respondent:	D Prinsloo
Instructed by:	ODBB Attorneys, Johannesburg
	McIntyre van der Post Attorneys, Bloemfontein.