THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 049/2024

In the matter between:

JJ BADENHORST N O	**APPLICANT**

and

MANYATTA PROPERTIES CLOSE CORPORATION	**FIRST RESPONDENT**
PHILLIP CORNELIUS DE WITT	**SECOND RESPONDENT**
MASTER OF THE HIGH COURT, NELSPRUIT	**THIRD RESPONDENT**
NIKIFON (PTY) LTD	**FOURTH RESPONDENT**
SWANEPOEL AND PARTNERS INCORPORATED	**FIFTH RESPONDENT**
CHRISTELLE DE WET	**SIXTH RESPONDENT**
DAVID BENNETT	**SEVENTH RESPONDENT**
THE REGISTRAR OF DEEDS, MBOMBELA	**EIGHTH RESPONDENT**
ANNA MAGDALENA ASHBURNER	**NINTH RESPONDENT**
ANNA MAGDALENA ASHBURNER N O	**TENTH RESPONDENT**
RONALD ASHBURNER N O	**ELEVENTH RESPONDENT**
CAROLINE ELIZABETH	

VERMEULEN N O	**TWELFTH RESPONDENT**
ANDRE ASHBURNER N O	**THIRTEENTH RESPONDENT**
ROANI ASHBURNER N O	**FOURTEENTH RESPONDENT**
ODUSSEE TRADING CC	**FIFTEENTH RESPONDENT**

Neutral citation: *Badenhorst N O v Manyatta Properties Close Corporation and Others* (049/2024) [2025] ZASCA 194 (17 December 2025)

Coram: DAMBUZA, GOOSEN, MOLEFE, KEIGHTLEY and KOEN JJA

Heard: 22 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 17 December 2025.

Summary: Special leave to appeal – Close Corporations Act 69 of 1984 – s 46*(b)*(iv) – sale and transfer of immovable property without written consent of other member – s 54(2) – close corporation bound by deed of sale – grounds for special leave to appeal established only in respect of order of costs *de bonis propriis* – full court order set aside and substituted.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Mashile and Ratshibvumo JJ and Greyling-Coetzer AJ, sitting as court of appeal):

1 The application for special leave to appeal is granted only in respect of the orders of costs *de bonis propriis* (the costs orders).

2 The application for special leave to appeal is otherwise refused.

3 The costs of the application for special leave to appeal shall be costs in the appeal.

4 The appeal against the costs orders is dismissed, save for the amendment effected to the high court order recorded in paragraph 5 below.

5 The order of the full court is set aside and substituted with the following:

'1. The appeal is dismissed with costs, save to the extent recorded in paragraph 2 below.

2. Paragraph 2 of the high court order is varied to read as follows:

"2. The applicant is ordered to pay the costs of the fourth, fifth, sixth, seventh, ninth to eleventh and fifteenth respondents on an attorney and client scale *de bonis propriis*."'

6 The applicant (appellant) is ordered to pay the fourth, fifth, sixth, seventh and fifteenth respondents costs in the appeal, including the costs of two counsel where so employed.

JUDGMENT

Keightley JA (Dambuza, Goosen and Molefe JJA concurring):

Introduction

[1] This is an application for special leave to appeal against a judgment of the full court of the Mpumalanga Division of the High Court, Mbombela (the full court), sitting as a court of appeal, in an appeal against the judgment and order of Roelofse AJ (the high court) in the same division. The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

[2] The dispute between the parties involves the sale and transfer of Portion 33 of the Farm Rietfontein in Mpumalanga (the property) from the first respondent, Manyatta Properties Close Corporation (Manyatta), to Nikifon (Pty) Ltd (Nikifon), the fourth respondent. The deed of sale was signed on 18 September 2014 by the second respondent, Phillip Cornelius de Witt (Mr de Witt), who held 50 percent of the member's interest in Manyatta. The registered holder of the remaining 50 percent interest in Manyatta was Mr de Witt's cousin, Mr Ernst Hendrik de Witt (the deceased), who died on 21 March 2010. Nikifon's director, Joao Richards (Mr Richards), signed the deed of sale on its behalf. Registration of the transfer to Nikifon was effected on 24 October 2014.

[3] At the time of the sale and transfer, Lisa Jane Metzer (Ms Metzer) was the appointed executrix of the estate of the deceased. It is common cause that she played no part in the transaction. The heir of the deceased's estate was his son, Ernst Hendrik de Witt junior (Mr de Witt junior). He, too, played no part in the sale and transfer of the property.

[4] In August 2020, ten years after the death of the deceased, and almost six years after the property had been transferred to Nikifon, Mr de Witt junior obtained an order removing Ms Metzer as executrix. His attorney in that application was the applicant in the matter before this Court, Mr J J Badenhorst, who was appointed subsequently as the new executor of the deceased estate. On 24 March 2021, acting *nomine officio* in his capacity as executor, the applicant instituted an application in which he sought to impugn the sale and transfer of the property to Nikifon. It was this application that served before the high court.

[5] The high court dismissed the applicant's claim, as did the full court subsequently on appeal. However, they did so for different reasons. Indeed, there was very little upon which the high court and full court agreed, in no small measure due to the applicant adjusting key aspects of his case as it progressed.

Pleadings

[6] The relief sought in the notice of motion included: the cancellation and setting aside of the agreement of sale between Manyatta and Nikifon; a declaration that Manyatta was the lawful and rightful owner of the property; the cancellation and setting aside of the unlawful transfer of the property to Nikifon; the cancellation of the title deed in the name of Nikifon; the issuing of a title deed in the name of Manyatta; and the cancellation and setting aside of several servitudes registered against the property subsequent to the transfer to Nikifon.

[7] In support of this relief, the applicant averred that there was a defect in the real agreement to pass transfer of the property from Manyatta to Nikifon. This was because, the applicant alleged, Mr de Witt had no authority to represent Manyatta when he signed the deed of sale, the resolution to sell, and the power of attorney to cause transfer to be effected. He was only a 50 percent member of

Manyatta. Consequently, in terms of s 46*(b)*(iv) of the Close Corporations Act 69 of 1984 (the CC Act)[1] the written consent of the holder of the other 50 percent of the member's interest, or Ms Metzer, as the executrix of his estate, was required for the disposal of the property. Her written consent was not sought or provided. Without this, it was averred, Manyatta could not have formed a valid intention to pass transfer, rendering the real agreement, and thus the transfer, defective.

[8] However, the main thrust of the case made out in the founding and replying affidavits went much further. The applicant did not simply rely on a defect in the real agreement based on the absence of authority. He averred that the transfer was 'fraudulent, unlawful and irregular'. The applicant made far-reaching allegations that the sale and transfer of the property were tainted by the fraudulent conduct of, and collusion between, Mr de Witt, Mr Richards, and the fifth, sixth and seventh respondents, who were the attorneys and conveyancers who attended to the sale and transfer.

[9] Mr de Witt was alleged to have committed fraud by signing the resolution to sell the property, the deed of sale and the power of attorney as the representative of Manyatta when he knew that he was not authorised to do so. In addition, the applicant averred that Mr Richards had colluded with Mr de Witt to dispose of the property for a 'deceitful and fraudulent purpose' for a purchase consideration of R1,3 million, an amount 'well below the market value'. Although the applicant estimated the value of the property at the time of the sale

[1] Section 46 deals with 'Variable rules regarding internal relations' and provides, in relevant part:
'The following rules in respect of internal relations in a corporation shall apply in so far as this Act or an association agreement in respect of the corporation does not provide otherwise:
…
(b) subject to the provisions of section 47, members shall have equal rights in regard to the management of the business of the corporation and in regard to the power to represent the corporation in the carrying on of its business: Provided that the consent in writing of a member holding a member's interest of at least 75 per cent, or of members holding together at least that percentage of the members' interests, in the corporation, shall be required for-
…
(iv) any acquisition or disposal of immovable property by the corporation'.

to have been R10 million, he adduced no evidence in the founding affidavit to substantiate this.

[10] The fifth to seventh respondents, (the conveyancing respondents) were not spared from the allegations of fraud either. According to the applicant they had a duty to ensure that there was proper authorisation for Mr de Witt to represent Manyatta in the sale and transfer of the property. He alleged that they had breached several, enumerated statutory obligations in failing to do so. Not only had they failed in their duties as attorneys and conveyancers, but they had also acted fraudulently, in collusion with Mr de Witt and Nikifon, in the sale of the property. Through their fraudulent, alternatively reckless or grossly negligent conduct, the conveyancing respondents were alleged to have participated in 'a fraudulent sale and transfer, dispossessing [Manyatta] of its only and extremely valuable farm asset, at a fraction of its true value'.

[11] This was the theme of the applicant's complaint that pervaded the founding papers. So egregious was the alleged 'fraudulent, dishonest and reprehensible conduct' of Mr de Witt, Nikifon and the conveyancing respondents, that the applicant sought a punitive costs order against them.

[12] The conveyancing respondents opposed the high court application, as did Nikifon, together with the fifteenth respondent, Odussee Trading CC (Odussee), the latter being the registered holder of a notarial deed of servitude sought to be cancelled by the applicant. The ninth to twelfth respondents (the Ashburner respondents) also opposed the application. Their interest in the matter arose from the Ashburner Family Trust being the holder of another of the notarial deeds of servitude registered over the property.

[13] Apart from taking issue on the merits, between them these respondents raised several points *in limine*. They asserted that the founding affidavit failed to

disclose a clear cause of action; that the applicant had no *locus standi* to impugn the transfer of a property which had not belonged to the deceased estate, but to Manyatta; that the claim had prescribed; and that motion proceedings were inappropriate because of the material factual disputes arising out of, among others, the allegations of fraud.

[14] The allegations of fraud were strenuously denied by all these respondents. Mr Richards, who deposed to the answering affidavit on behalf of Nikifon and Odussee, expressly denied that he had acted fraudulently or had any knowledge that Mr de Witt was not authorised to represent Manyatta in concluding the deed of sale.

[15] Mr Richards explained that he was Mr de Witt's neighbour. Mr de Witt lived on the property and, from what Mr Richards had observed, he behaved as if he was in charge of and fully entitled to deal with it. Mr Richards thought Mr de Witt was the owner. He had negotiated a purchase price with Mr de Witt and, once this had been agreed, they had appointed attorneys to assist them to draw up the necessary sale and transfer documents. Mr Richards stated that he had trusted the attorneys to ensure that all the paperwork was accurate and properly drawn up so that the sale would be valid. Relying on s 54(2)[2] of the CC Act, Mr Richards contended that even if, as an objective fact, Mr de Witt had lacked the necessary authority to sell the property on behalf of Manyatta, Nikifon's position as a *bona fide* purchaser was legally protected, as Manyatta was nonetheless bound by the deed of sale.

[16] In addition, Mr Richards averred that Nikifon had made substantial improvements, additions and repairs to the property in the years since the sale and

[2] Section 54 is set out fully in para 52 below.

transfer. This had been done in the *bona fide* belief that Nikifon had acquired valid title to the property. Consequently, Nikifon had an improvement lien over the property which prevented the applicant from being granted his claimed relief. Mr Richards provided evidence that in 2015, after Nikifon had increased the value of the property by planting a substantial number of new macadamia trees, the property was valued at R2,15 million. This valuation conflicted with the applicant's unsubstantiated assertion that Nikifon had purchased the property for a fraction of its market value.

[17] Although Mr de Witt did not oppose the high court application, he deposed to an affidavit which was annexed to the conveyancing respondents' answering affidavit. He also denied the existence of a fraudulent scheme. Mr de Witt provided a history of the farm and of the deceased's acquisition of his 50 percent of the member's interest in 2005.

[18] According to Mr de Witt, he and the previous holder of the 50 percent members interest, a Mr Kruger, had an arrangement in terms of which Mr de Witt would live on the property and be responsible for all the operational expenses of the farming activities. Mr Kruger would be responsible for the mortgage bond payments. The deceased took over Mr Kruger's 50 percent member's interest in 2005 for no consideration. Thereafter, the pre-existing arrangement continued between Mr de Witt and the deceased.

[19] Mr de Witt continued running the day-to-day activities and carried all the operational expenses. The deceased assumed responsibility for the bond repayments. At the deceased's funeral, according to Mr de Witt, Mr de Witt junior informed him that he had no interest in the farm. Mr de Witt accepted from this that Mr de Witt junior would not contribute to the farm in any way and that he 'would leave me to run the farm, and [Manyatta], as my own'. He stated that

neither Ms Metzer nor Mr de Witt junior expressed any further interest in the property.

[20] Mr de Witt stated further that the farm did not make a profit and, after two fires had caused considerable damage, coupled with break-ins and thefts, he found himself in financial distress. He averred that Mr de Witt junior had refused to contribute to offset the losses incurred. The only viable option he had was to sell the property. Mr Richards offered him R1,3 million which Mr de Witt felt was a good price, as it was R100 000 more than the best offer he previously had received.

[21] On his signature of the deed of sale and related transfer documents, Mr de Witt stated that he had told Mr Richards and the conveyancing attorneys that he owned the farm as 'I regarded myself as the owner of [the deceased's members interest], and hence the farm, and that I alone could deal with and sell the farm'. He had instructed the conveyancing attorneys to deposit the purchase price into his bank account, and he used it to pay off Manyatta's debt. Mr de Witt denied that he had acted fraudulently, stating that it was 'opportunistic and unreasonable for any person, not knowing the history of the farm, including the financial distress I found myself in, to make such allegations.'

[22] The conveyancing respondents confirmed that Mr de Witt had told them that he was the sole member and that the deed of sale, resolution by Manyatta to sell the property, and the power of attorney had been prepared and signed by Mr de Witt alone on this basis. The deponent to the conveyancing respondents' answering affidavit, Ms de Wet, described Mr de Witt as 'effectively the only member' of Manyatta and thus that he had the power to sell and transfer the property. She pointed out that the preliminary inventory of assets in the deceased estate, which did not list the deceased's members interest in Manyatta as an asset,

confirmed that neither Ms Metzer nor Mr de Witt junior regarded it as such, and that they had left Mr de Witt to manage Manyatta on his own.

[23] Ms de Wet also denied the allegations of fraud and collusion on the part of the conveyancing attorneys. She averred that they were made without factual substantiation, were irresponsibly and opportunistically made, and were defamatory. She contended that the conveyancing respondents had acted in accordance with their statutory duties.

[24] All the respondents who opposed the high court application placed the applicant on notice that should he proceed with the application they would seek punitive costs orders. Specifically, they warned, for reasons spelled out in their affidavits, that they would seek orders of costs *de bonis propriis* against the applicant.

[25] The applicant filed lengthy replying affidavits addressing both the merits and the points *in limine* raised in the answering affidavits. He clarified that the cause of action was the *rei vindicatio*, and that he sought 'vindicatory relief based on allegations of fraud, collusion and non-compliance with statutory requirements.' He also expressly confirmed that the relief sought in the notice of motion was not merely declaratory.

[26] On his *locus standi*, the applicant stated, for the first time, that he did not only act for the estate, but also for Manyatta. As the executor of the deceased's estate, he asserted that he was, in law, a 50 percent member of Manyatta and thus 'empowered to act on behalf of [the deceased] and on behalf of and for the benefit of [Manyatta]' in seeking vindicatory relief, based on its ownership of the property.

[27] Moreover, because of the fraudulent and unlawful conduct of Mr de Witt, the applicant stated that s 50(1)*(b)*(i) of the CC Act provided a statutory derivative cause of action. It entitled him to institute proceedings, on behalf of Manyatta, against Mr de Witt to protect Manyatta's interests. This, the applicant contended, was a complete remedy.

[28] On the question of prescription, the applicant averred that there was no merit in the defence. First, because of the real nature of the claim, based on the *rei vindicatio*, the claim was not a 'debt' that could prescribe. Second, where fraud is involved, the impugned conduct constitutes an ongoing harm. For this reason, too, the claim was not in the nature of a 'debt' subject to prescription.

[29] Regarding the allegations of fraud, the applicant declined to temper his attacks. On the contrary, he not only defended, but escalated his allegations against Mr Richards and the conveyancing respondents. He accused the former of acting 'in cahoots' with Mr de Witt to commit 'whole[sale] fraud' and of being the beneficiary of a fraudulent transfer of property. Moreover, Mr Richards was precluded from exercising any improvement lien or claiming reimbursement because, according to the applicant, 'fraud unravels all subsequent transactions', even if Mr Richards was *bona fide*, which he was not.

[30] The applicant stated of the conveyancing respondents that it was inconceivable that 'whilst now being fully aware that a fraud has been perpetrated, they would glibly cover up their grossly negligent and reckless actions if they were not in cahoots'. The applicant asserted that Mr de Witt had incriminated himself in his affidavit and thus that the fraud was an objective fact.

High court application

[31] The application before the high court proceeded on the basis that the applicant's cause of action was the *rei vindicatio*, coupled with a derivative action

under s 50(1)*(b)*(i) of the CC Act. The first issue considered by the high court was whether the applicant had *locus standi* to institute a claim for vindicatory relief. It found that such relief can only be claimed by the owner of property. The deceased, into whose shoes the applicant had stepped, was not the owner of the property. Consequently, the court found that the applicant had no standing to pursue a claim for vindicatory relief.

[32] The court considered whether the applicant's reliance on s 50(1)*(b)*(i)[3] might provide him with the necessary *locus standi* and an alternative remedy. It found that the derivative action established under this section was only available to a member of a close corporation, acting on its behalf, against another member. The applicant's claim did not fall into this category, as it was essentially a claim for vindication of the property from a third party, Nikifon, and not Mr de Witt. Consequently, s 50(1)*(b)*(i) was of no assistance to the applicant.

[33] As a result, the applicant's claim was dismissed by the high court without consideration of the merits, save insofar as the allegations of fraud were relevant to the issue of costs. In this respect, the high court took the view that the applicant's case was unsustainable and that the allegations of fraud had been made 'without proper consideration of the veracity or gravity thereof.' The applicant had been forewarned, from the answering affidavits, that there may have been other plausible explanations, yet he had persisted with the allegations of fraud and gross negligence. Although punitive costs were awarded only on rare

---

[3] Section 50 reads:
'Proceedings against fellow-members on behalf of corporation.
(1) Where a member or a former member of a corporation is liable to the corporation-
…
(b) on account of-
(i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of s 42; or
…
any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so.'

occasions when special circumstances existed, the high court concluded that the case warranted a *de bonis propriis* order of costs, on an attorney and client scale.

[34] In the judgment of the high court, it was noted that the applicant was given the opportunity to make written representations on what steps should be considered if the allegations of fraud were found to have been without foundation, but that the applicant had not heeded this invitation. This remark was inaccurate, as it is common cause that the applicant had made further written submissions which were emailed to the court.

Full court appeal

[35] When the matter came before the full court on appeal the applicant caused no small measure of confusion by executing an about-turn on his cause of action. He now expressly disavowed any reliance on the *rei vindicatio*, contending that his claim had never been for delivery and possession of the property. On the contrary, he argued, the claim was for no more than declaratory relief, pertaining to the validity of the sale and transfer. Taking this point further, the applicant submitted that the high court had erred in permitting his counsel in those proceedings to rely on vindication as his cause of action when this was not addressed in either the founding affidavit or the notice of motion.

[36] The full court agreed with this submission. According to the full court, the cause of action in the founding affidavit and notice of motion had always been for declaratory relief. It found that the court had misdirected itself by not holding the applicant to what he had sought in the founding papers. In the full court's view, the court *mero motu* ought to have prohibited the applicant from relying on the *rei vindicatio*.

[37] Despite apparently accepting the declaratory nature of the claim, the full court dismissed the appeal on the basis that the claim was a debt that had prescribed. It approached the question of prescription first by asking whether the applicant was correct in asserting that prescription could not begin to run because of the continuous wrong, in the form of the fraud, underpinning the transfer of the property. The full court examined the merits of the applicant's case based on fraud and collusion and, having done so, concluded that the applicant's case that the sale and the transfer of the property was tainted by fraud and collusion was 'dead in the water'. It found that there were inadequate facts furnished to establish the fraud.

[38] The full court then considered the applicant's contention that as the relief sought was declaratory, the claim was not a debt subject to prescription. On this issue, the full court inexplicably found, contrary to its earlier finding, that the applicant had never only sought declaratory relief. It pointed to the prayers for the cancellation of Nikifon's title and for the re-registration of title in the name of Manyatta which, stated the full court, were not declaratory in nature. The full court accepted that while pure declaratory relief may not constitute a 'debt' subject to prescription, the remainder of the relief sought in the notice of motion was not declaratory in nature and was vulnerable to prescription.

[39] As the full court noted, its finding that the claim had prescribed was dispositive of the appeal. Nonetheless, it proceeded to deal with several other aspects of the case in its judgment. Among others, the full court found that the applicant had *locus standi*, as the executor of the deceased's estate, to seek declaratory relief. The full court did not consider the applicant's *locus standi* to claim the remainder of the relief.

[40] It also found that the applicant could invoke a derivative action on behalf of Manyatta, albeit not based on s 50(1)*(b)*(i). Before the full court the applicant had deviated from his express reliance on s 50(1)*(b)*(i) as the source of his derivative action. He contended that while that section might not be applicable, he had available to him the common law derivative action in terms of which he could seek relief against a third party, Nikifon, on behalf of Manyatta. The full court agreed with this submission.

[41] The full court also addressed the question of the absence of authority. It found that Mr de Witt was not authorised to act for Manyatta in concluding the sale agreement, signing the resolution for the sale, and the power of attorney without the written consent of Ms Metzer. It rejected Nikifon's contention that despite the absence of actual authority, the effect of s 54 of the CC Act was that Manyatta was bound by the agreement of sale with Nikifon. This was because Nikifon 'knew through its conveyancers that [Mr] de Witt did not have the power to represent Manyatta in the sale of the property.'

[42] Pertinently, the full court did not address the appeal against the high court's punitive costs order against the applicant. This was one of the grounds of appeal before it, and the issue was canvassed before the full court. Despite this, the court simply made an order dismissing the appeal with costs.

Before this Court

[43] The applicant's case has shifted once again before this Court. Despite the serious allegations made in his founding and replying affidavits, he no longer contends that there was a scheme of fraudulent collusive conduct on the part of Mr de Witt, Mr Richards and the conveyancing respondents in the sale and transfer of the property. His case now is simply based on an absence of authority,

rather than fraud, as the reason for what he contends to be the invalidity of the sale and transfer.

[44] The applicant maintains his position that the claim is for declaratory relief and no more. He seeks amended, streamlined relief: declaring the deed of sale and transfer void; cancelling Nikifon's title deed; directing that Manyatta's title deed is revived; and cancelling the notarial deeds of servitude. The applicant has abandoned the prayer for a declaration that Manyatta is the lawful owner of the property, and for orders directing the registrar of deeds to cancel the title deed and notarial deeds of servitude. He seeks costs on an attorney and client scale.

[45] The applicant's averred cause of action has also been revised. He now pins his cause of action on s 6 of the Deeds Registries Act 47 of 1937 (the Deeds Act), supported by the abstract theory of transfer of ownership in immovable property. He argues that because Mr de Witt was not authorised to act for Manyatta in signing the deed of sale and related transfer documents, there was no real agreement on its part to pass transfer. This being the case, ownership was never transferred to Nikifon. He contends that s 6(1) of the Deeds Act gives the high court the power to cancel a title deed with the effect, under s 6(2), that the previous title deed is revived.[4]

[46] It is for this reason, he submits, that the claim is purely declaratory in nature. Nothing more is sought from this Court than a declaration that the transfer to Nikifon is void (because of the defective real agreement) and its title deed is

[4] Section 6 reads:
'(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, … shall be cancelled by a registrar except upon an order of Court.
(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

cancelled, whereafter s 6(2) automatically revives Manyatta's title. This, says the applicant, puts paid to any argument that the claim has prescribed, as it is settled law that a claim for declaratory relief is not a 'debt' subject to prescription.[5]

[47] The applicant seeks leave to challenge the full court's judgment and order in two respects. He contends that the full court ought to have upheld the appeal and substituted the high court's order with one granting him the relief he sought. I deal with this aspect of the application below, under the heading, 'Special leave to appeal: merits'.

[48] The applicant also seeks leave to appeal in respect of the failure by the full court to consider his appeal against the *de bonis propriis* costs order granted by the high court. I deal with this separate aspect of the application later, under the heading 'Special leave to appeal: costs *de bonis propriis'*.

Special leave to appeal: merits

[49] The question here is whether the applicant has established the grounds necessary to justify the grant of leave, by this Court, to appeal the full court's order dismissing his challenge to the high court's order on the merits of his application. As this is an application for special leave to appeal, it is not sufficient for the applicant simply to show that he has reasonable prospects of success were leave to be granted. He must show something more. Generally, in an application for special leave to appeal, it may be sufficient to demonstrate that the appeal raises a substantial question of law; or if it raises only questions of fact, that they are of great importance to the parties or to the public; alternatively, that the prospects of success are so strong that the refusal of leave would probably result in a manifest denial of justice.[6]

---

[5] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* (CCT106/16) 2017 (5) SA 9 (CC); [2017] ZACC 15; 2017 (7) BCLR 916 (CC) (*Off Beat*) para 48.
[6] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564F-565E.

[50] In the applicant's heads of argument, it was contended that, were special leave to be granted, the appeal would raise substantial points of law. However, in oral argument, counsel for the applicant emphasised that the application essentially turns on what are contended to be the strong prospects of success on appeal. The applicant argues strenuously that there was so obvious a defect in the real agreement, and the prospects of success so overwhelmingly favour him, that there would be a manifest denial of justice were he to be denied the opportunity to overturn the full court's judgment dismissing his appeal.

[51] To succeed in establishing this ground for special leave to appeal, the applicant must demonstrate that the sale and transfer of the property to Nikifon was not simply arguably invalid, but patently so. He relies on the common-cause fact that Mr de Witt signed the sale and transfer documents as the holder of 50 percent of the member's interest in Manyatta without the written authority of Ms Metzer as the holder, in her representative capacity, of the remaining 50 percent. The applicant's case is that the inevitable consequence of this contravention of s 46*(b)*(iv) of the CC Act is that Mr de Witt had no power to bind Manyatta to the transaction. This absence of authority rendered the real agreement fatally defective. Consequently, he contends, the full court patently erred in concluding that the transfer of the property to Nikifon was valid.

[52] The difficulty for the applicant is that s 46(*b*)(iv), which forms the cornerstone of his case, cannot be considered in isolation. It is a provision regulating the internal relations of close corporations. There are other provisions of the CC Act that regulate close corporations in their transactional relationships with third parties. Central to this matter is s 54(2), which provides:

'Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation *unless the member so acting has in fact no power* to act for the corporation in the particular matter *and the person with whom the member deals*

has, or ought reasonably to have, knowledge of the fact that the member has no such power.' (My emphasis.)

[53] Section 54(2) is significant because it recognises that not all transactions lacking authority will be invalid. Its purpose is to protect third parties who *bona fide* transact with a close corporation in the reasonable belief that a member is authorised to act on its behalf, even if that authority *de facto* is absent. The effect is that where the third party satisfies the section's requirements the close corporation will be bound *ex lege* to comply with its obligations. The question is whether Nikifon satisfied these requirements.

[54] The matter proceeded on motion. As outlined earlier, in the answering affidavit filed on behalf of Nikifon, Mr Richards explained why he believed Mr de Witt could act on Manyatta's behalf. This explanation was not disputed by the applicant adducing evidence to the contrary. Mr Richards' explanation is not implausible, far-fetched or so untenable that it would fall to be rejected were the matter to proceed to an appeal.[7] His version must be accepted. On that version, there was no reason for him to have known that the prescripts in s 46(*b*)(iv) required Ms Metzer's written consent for the sale and transfer of the property, or that Mr de Witt had not obtained it. Mr de Witt was his neighbour. He lived on and was responsible for the operations conducted on the property. He gave every indication, according to Mr Richards, that he was fully entitled to deal with the property.

[55] A reasonable person in Mr Richards' position would not be expected to delve any further. Mr Richards acted reasonably in relying on the lawyers who were engaged by both parties to ensure there was compliance with all legal technicalities. This is, after all, the job of specialist property lawyers and

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623.

conveyancers. While the conveyancing respondents neglected to make the necessary inquiries about Mr de Witt's member's interest before compiling the sale and transfer documents, Mr Richards cannot reasonably have been expected to double-check their actions. Neither can their knowledge, or what they ought reasonably to have known had they carried out their duties properly, be attributed to Mr Richards.

[56] I find that Nikifon satisfied the requirements of s 54(2). Consequently, the sale and transfer of the property were legally binding on Manyatta. Mr de Witt's *de facto* absence of authority had no effect on the sale and transfer. Nikifon, and not Manyatta, is the lawful owner of the property. It follows that there are no, let alone, strong, prospects of success were the matter to proceed on appeal.

[57] I conclude that the applicant has failed to establish a case for why special leave to appeal should be granted by this Court against the full court's dismissal of the appeal on the merits of the high court application. The remaining question is whether special leave to appeal is warranted in respect of the order of costs *de bonis propriis* against the applicant.

Special leave to appeal: costs *de bonis propriis*

[58] The applicant submits that even if special leave is not granted in respect of the merits, it is nonetheless justified insofar as the punitive costs order is concerned. As I recorded earlier, the high court invited submissions from the applicant on, among other matters, why an order of costs *de bonis propriis* ought not to be made against him. However, it appears from the high court's judgment that it failed to take his submissions into account before it made its costs order. Compounding the issue, the full court, in turn, failed to address the appeal against this costs order.

[59] The applicant submits that a case for special leave to appeal in respect of the costs order is established in that these failures constitute a violation of his rights under s 34 of the Constitution: he was not given a fair hearing before the full court, nor did the full court give reasons for dismissing his appeal in respect of the costs order. The applicant contends that should the costs order be permitted to stand without further adjudication, this will result in a failure of justice and undue hardship.

[60] There were material shortcomings in the manner in which both the high court and the full court dealt with the question of the *de boniis propriis* costs award. In inviting further submissions from the applicant, the high court clearly signalled that it wished to give further consideration to the costs issue. In the mistaken belief that the applicant had declined its invitation, the high court failed to consider his submissions. This unfortunate state of affairs undermined the applicant's right under s 34 of the Constitution to a fair hearing on the question of *de bonis propris* costs.

[61] As I noted earlier, the full court's complete failure to deal with the applicant's appeal against the costs order is inexplicable. This was an important aspect of the appeal. The judgment of the full court is simply silent on the issue. It must follow that in this respect, too, the applicant's right to a fair hearing was undermined.

[62] Consequently, I find that on the issue of the costs order *de bonis propriis*, special leave to appeal is justified. The remaining question is whether there is merit in the appeal against the costs order.

[63] It is trite that a court on appeal has limited power to interfere with a costs order made by the court below and may only do so where the lower court did not

exercise its discretion judicially. The issue of de *bonis propriis* costs was canvassed in the affidavits. All the respondents who opposed the application motivated why punitive costs should be awarded against the applicant in his personal capacity in their answering affidavits. The applicant had the opportunity to respond to these averments in his replies. He, in turn, sought punitive costs against the other parties.

[64] The record demonstrates that the application was ill-conceived from its commencement. Mr Badenhorst failed from the outset to establish a clear case on such fundamental issues as his *locus standi* and cause of action. This led to significant confusion in the courts below. Moreover, as the high court noted, the case was based on serious, repeated allegations of a collusive fraudulent scheme involving Mr de Witt, Mr Richards and the conveyancing respondents. The respondents were effectively accused of acting in concert to strip Manyatta of its only asset, to the detriment of the deceased estate. There was no evidence to support these allegations. The applicant insisted on pursuing his case by way of motion proceedings despite the trite principle that allegations of fraud ought not to be easily made and are not lightly established.

[65] In the face of the denials recorded in the answering affidavits, and warnings that the respondents would seek orders of costs *de bonis propriis* against him, the applicant escalated his allegations of fraud. He is an attorney and played a central role in the formulation of the case through its various stages. The high court noted that as the applicant, he was represented by his own firm of attorneys, J J Badenhorst & Associates Attorneys Incorporated, in the matter. Thus, he acted as both attorney and client.

[66] Being an attorney the applicant ought to have known that, in the absence of adducing evidence to counter Mr Richards' and the conveyancing respondents'

denials of fraud and collusion, their versions would prevail. He should have appreciated that these allegations were unsustainable, yet he persisted. Instead of approaching the matter reasonably and objectively by focusing on the streamlined issues that ultimately settled the dispute, he chose instead to assume the mantle of accuser. Viewed reasonably and objectively, the deficiencies in the conveyancing process were sufficient to mount a reasonable legal challenge to the transfer. Had Mr Badenhorst appreciated this, as he ought to have done as the attorney, it is unlikely that the issue of punitive costs, which he was the first party to pursue, would have become such a contentious issue in the case.

[67] In my view, the high court did not commit a misdirection in concluding that the applicant's conduct materially deviated from what is expected of a professional in his position, and that it warranted censure in the form of *de bonis propriis* costs. As that court noted, it was the applicant who made the offensive allegations and he, rather than the deceased estate, should bear the costs. Nikifon contended in its answering affidavit that the estate was insolvent and that, unless costs were awarded against him *de bonis propriis*, it was unlikely that they would be able to recover any costs from the deceased estate. The applicant adduced no evidence to the contrary.

[68] The conveyancing respondents ought to have prepared the deed of sale and conveyancing documents with far more diligence than they appear to have done. It is so that Mr Badenhorst's case relied, in part, on their failings in this regard. However, this does not mean that Mr Badenhorst's primary focus of complaint against them, namely, their alleged fraudulent and collusive conduct with the other role players, ought to have escaped the censure of a punitive costs order in their favour in the high court. The main thrust of Mr Badenhorst's case from the outset was to tie the conveyancing attorneys, Mr de Witt and Mr Richards, together as part of that collusive scheme, whether on the basis of gross negligence

or fraud. This was a case that Mr Badenhorst could not reasonably have hoped to succeed with in motion proceedings. In my view, the punitive costs order in the conveyancing respondents' favour was justified.

[69] In the circumstances, I am not persuaded that the applicant has established that there were grounds for the full court to interfere with the punitive costs order made by the high court in respect of the respondents who are parties before this Court. However, there is one respect in which an amendment to that order is justified. The high court granted costs *de bonis propriis* in favour of Mr de Wet. As I have recorded, he did not oppose the high court application, although he provided the conveyancing respondents with an affidavit, in which he denied that he had acted fraudulently.

[70] Mr de Wet expressly stated in his affidavit that he did not oppose the application, other than 'pleading that no costs order be made against me'. It is plain from this that Mr de Wet did not seek any costs order in his favour, let alone an order *de bonis propriis* on an attorney and client scale. The high court committed a misdirection in including Mr de Wet in the costs order, and the full court ought to have ordered the necessary amendment to the high court order. Save in this respect, the appeal against the costs order of the high court fails.

Costs of the application/appeal

[71] On the question of the costs of this application and appeal, although the applicant has been granted special leave to appeal, this is only on the narrow issue of the *de bonis propriis* costs order. It is appropriate that the costs of the application for special leave to appeal should form part of the costs of the appeal. The applicant has failed in his appeal against the costs orders made by the high court in favour of the respondents who were parties to the proceedings before this Court. There is no reason why costs should not follow this result.

[72] Regarding the nature and scale of these costs, Nikifon and Odussee seek costs *de bonis propriis* against the applicant on the attorney and client scale. The conveyancing respondents seek no more than costs on the ordinary scale.

[73] As regards the latter respondents, they were well-advised not to seek punitive costs in this appeal. The facts demonstrate that they failed to carry out their statutory duties to ensure that the requisite consent was obtained from the executrix, and that the conveyancing documentation was accurate before attending to the sale and transfer of the property. It was their professional failures that resulted in the dispute about the legality of the transfer.

[74] The applicant pursued his unsubstantiated case of a fraudulent collusion against Nikifon in both the high court and the full court. These courts exonerated Mr Richards and Nikifon of the allegations of fraud. Before this Court, in both his written and oral submissions, it was clear that the applicant no longer persisted with them. In my view, in these circumstances, there is no need to impose any further punitive order of costs against the applicant. All the respondents who were parties to the appeal are entitled to costs on the ordinary scale.

[75] In the result, and for all the above reasons, I make the following order:

1 The application for special leave to appeal is granted only in respect of the orders of costs *de bonis propriis* (the costs orders).

2 The application for special leave to appeal is otherwise refused.

3 The costs of the application for special leave to appeal shall be costs in the appeal.

4 The appeal against the costs orders is dismissed, save for the amendment effected to the high court order recorded in paragraph 5 below.

5 The order of the full court is set aside and substituted with the following:

'1. The appeal is dismissed with costs, save to the extent recorded in paragraph 2 below.

2. Paragraph 2 of the high court order is varied to read as follows:

"2. The applicant is ordered to pay the costs of the fourth, fifth, sixth, seventh, ninth to eleventh and fifteenth respondents on an attorney and client scale *de bonis propriis*."'

6 The applicant (appellant) is ordered to pay the fourth, fifth, sixth, seventh and fifteenth respondents costs in the appeal, including the costs of two counsel where so employed.

R M KEIGHTLEY
JUDGE OF APPEAL

Koen JA:

[77] I agree with the conclusion reached in the judgment of Keightley JA (the first judgment), that the provisions of s 54(2),[8] read with s 46*(b)*(iv)[9] of the CC Act, are dispositive of the merits of the appeal. I, however, respectfully disagree with part of the costs orders and the formulation of the relief. My reasons follow below.

Special leave to appeal

[78] The high court had invited the applicant to make written representations, as to what should inform its costs order, should it consider his allegations of fraud to be unwarranted. The applicant duly delivered his submissions, but they were not considered by the high court. This constituted a material irregularity. It

[8] Quoted in paragraph 52 of the first judgment.
[9] Op cit fn 1.

violated the judicial process and the *audi alteram partem* (hear the other side) principle. Not surprisingly, this irregularity became a ground of appeal to the full court. The full court, however, similarly failed to deal with the issue. That too constitutes a material irregularity.

[79] Separately and cumulatively, these irregularities constitute a material failure of justice. The full court had granted a single composite order dismissing the appeal with costs. Both that order and the order of the high court need to be corrected. The costs awards by the high court cannot stand. I, accordingly, would grant special leave to appeal against the judgment of the full court in respect of the awards of costs on attorney and client scale *de bonis propriis* made by the high court against the applicant, with costs, such costs to include the costs of senior counsel.

[80] The aforesaid omissions of the high court and the full court have resulted in no proper discretion as to what would have been an appropriate award of costs in the application before the high court, ever having been exercised. That can be addressed: either by the question of the costs of the application before the high court being referred back to it for determination; or this Court determining what the costs orders should be. As the application was decided by the high court on the affidavits, this Court is in as good a position as the high court to determine what costs awards should have been made. It will also bring finality to the litigation and result in a saving of further costs. This judgment proceeds on that basis.

The appeal on the merits before this Court

[81] I agree that the appeal, other than for the full court's failure to have dealt with the awards of costs made by the high court, stands to be dismissed with costs. The full court came to the correct conclusion, as regards the merits, that the appeal

should be dismissed, even though it found that the ground which this Court has now held to be dispositive of the appeal, did not find application.

[82] As regards the costs of the appeal before this Court, there is nothing material which would justify a punitive costs award, whether *de bonis propriis* or on the attorney and client scale. Indeed, there was an express disavowal by the applicant of any reliance on the allegations of fraud. An award of party and party costs in favour of Nikifon, Odussee and the conveyancing respondents, on the basis of their substantial success, as had also been ordered by the full court in respect of the appeal heard by it, is appropriate.

The substitution of the costs awards of the high court

[83] The high court awarded costs on the attorney and client scale *de bonis propriis* in favour of the second respondent, Mr de Witt, the fourth and fifteenth respondents, Nikifon and Odussee, the conveyancing respondents, the fifth to seventh respondents, Swanepoel and Partners Inc, Ms Christelle de Wet and Mr David Bennett, and the Ashburner respondents, referred to in its judgment as the 'ninth to eleventh' respondents.[10] Its 'decision' was informed by the allegations of fraud made by the applicant, which were considered to be unwarranted.

[84] It is necessary to consider the conduct of the various categories of respondents before the high court, to determine what costs they should be awarded, keeping in mind that punitive costs orders are the exception and not easily granted.[11] It is only if the allegations made by the applicant were not reasonably justified, having regard to the principles relating to pleadings, that punitive costs orders should be considered.

---

[10] There is no cross appeal in respect of this order.

[11] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GP) paras 34 - 35.

The allegations of fraud and other acts of gross negligence

[85] In his application to the high court, the applicant had sought an order inter alia, cancelling and setting aside 'the fraudulent, unlawful and irregular transfer of and registration of ownership' of the property. These 'allegations of fraud, corruption and other acts of gross negligence' were made, as the finding in the judgment of the high court correctly recounts, against Mr de Witt, the conveyancing respondents and Nikifon.

[86] No allegations of fraud were made against the Ashburner respondents. They opposed the application before the high court on its merits.[12] They were successful, as the high court dismissed the application on the merits. They are entitled to their costs in the high court, but there is no reason to depart from the usual party and party scale. They did not participate in the appeal to the full court, or the appeal before this Court.

The second respondent - Mr de Witt

[87] It would be inappropriate to award Mr de Witt any costs for at least two reasons: first, he had not opposed the application and had not asked for any costs to be awarded in his favour; and second, the allegation made against him by the applicant were, objectively reasonable and justified. It was entirely within the applicant's rights to advance these allegations for proper ventilation, in the interest of the judicial process and the privilege accorded to pleadings.[13] It will suffice, for the purposes of this judgment, to refer briefly to only one example.

---

[12] The judgment of the high court in fact reflects that only the ninth to eleventh and fourteenth respondents were represented by it. That reference appears to be incorrect.

[13] *Findlay v Knight* 1935 AD 58. The policy consideration underlying a Court's reluctance to order costs against a legal representative is that attorneys and counsel are expected to pursue their client's rights fearlessly, without regard for personal convenience and that they ought not to be intimidated by their opponent or even the Court – *Verster v Ribbens* [2023] ZAGPPHC 440 (15 June 2023). E A L Lewis *Legal Ethics* 150.

[88] Mr de Witt signed the power of attorney to transfer the property which, in its original form, as legally required, remains filed in the Deed's Registry as a matter of public record. In the power of attorney, Mr de Witt publicly declared that he was duly authorised to transfer the property by a resolution of the members ('lede') of Manyatta. He had also signed a resolution, some four days earlier, recording as a fact that he had been authorised by members ('lede') of Manyatta in Pretoria on 18 September 2014, to sign all documents required to be signed for the transfer of ownership of the property to Nikifon. This resolution, in express terms, required that it be signed by all the members ('MOET DEUR ALLE LEDE GETEKEN WORD'). It was not signed by all the members. The resolution would remain filed with the conveyancing respondents.

[89] It is common cause that Manyatta at all material times had two registered members, namely Mr de Witt and the deceased (who would have to be substituted by his executrix). This is confirmed also by other public records, such as Manyatta's founding statement, which is accessible by a simple search with the Companies and Intellectual Property Commission.

[90] Mr de Witt knew that Manyatta had 'members' beyond himself, and that a resolution of all the members was required. There is, otherwise, no reason why he would have signed a power of attorney and the resolution recording that he was authorised by the 'members', if he believed he was the only member or could act alone, unless he intended what is recorded in the power of attorney and resolution to be false misrepresentations, which would constitute prima facie fraudulent conduct on his part.

[91] He could not, in the power of attorney, record that he was authorised to act on his own, that is, not authorised by a resolution of members, otherwise the transfer would not have been registered. He required to represent that he was

authorised by a resolution of members. But, there was in truth, no resolution of the members of Manyatta. Mr de Witt knew that too. If there was a valid resolution of members then it would have been produced by him and the conveyancer respondents. Moreover, he could not reasonably have believed that he was authorised to act on his own, whether based on an informal discussion he may have had with Mr de Witt junior, while the latter was grieving at his late father's graveside, or any subsequent conduct, or from any inactivity on the part of the previous executrix. If that was his state of mind, then he would have instructed the conveyancer respondents to refer to the authority to transfer, as being his decision alone.

[92] It was for Mr de Witt, in the application before the high court, to produce the resolution signed by both the members of Manyatta, which he said authorised him to conclude the power of attorney. Moreover, as the transfer would involve the disposal of immovable property by Manyatta, the resolution required would be one in terms of s 46*(b)*(iv) of the CC Act, that is a resolution in writing and passed by all the members of Manyatta, by at least a 75 per cent majority. No such resolution has been produced.

[93] Mr de Witt's public recordal that he was so authorised by a resolution of 'members', is prima facie untrue. The purported resolution of members, contrary to its tenor, signed by Mr de Witt only, is not a proper resolution of the members.

[94] Mr de Witt's conduct was prima facie fraudulent. He could not append his signature to a document publicly representing that there was a resolution of members, when there was none. Without a proper resolution the transfer could and should never have been registered. The allegations against Mr de Witt were prima facie justified. There was never any basis for any costs award in Mr de

Witt's favour, especially not a punitive costs award on the attorney and client scale, *de bonis propriis*.

[95] It is not necessary to make a precise finding regarding the extent of Mr de Witt's fraud. The issue is purely whether, on even the terse available facts recounted above, it was reasonable to infer that Mr de Witt had acted in a fraudulent or unlawful manner. Clearly, the applicant was entitled to make the allegations he did in respect of the conduct of Mr de Witt.

[96] The views expressed above are prima facie views based on what is contained in the affidavits and annexures. They are not definitive findings. Motion proceedings are conducted under oath and on the basis that the contents of affidavits sworn to be the truth, reflect the position truthfully. The circumstances regarding the transfer of the property briefly alluded to above, are of serious concern. The application papers and a copy of this judgment shall be referred to the Director of Public Prosecutions to consider whether any further action should be taken against Mr de Witt arising from the contents of his affidavit and the other documents filed in this matter.

[97] In the interests of brevity, I do not intend commenting further on Mr de Witt's conduct. It has become largely academic for the purposes of the judgment, save for the issue of costs, as the outcome of this appeal is based on s 54(2) of the CC Act. Only the conduct and the knowledge of Mr Richards are relevant in that regard.

The fifth to seventh respondents – the conveyancing respondents

[98] The fact that Mr de Witt was not Manyatta's only member, and that it had, at least, two members, who had to pass any resolution to properly authorise Mr de Witt to transfer ownership of the immovable property, was also known to the

conveyancing respondents. If not, then they would have had no reason to prepare the power of attorney and resolution of members, to refer to Mr de Witt being authorised by members ('lede') and for the resolution to be signed by all the members of Manyatta.

[99] The conveyancing respondents could not rely on Mr de Witt's mere say so that he was authorised by Manyatta to lawfully pass transfer of ownership of the property. They had to satisfy themselves as to the integrity of the information provided to them on which they would base their transfer documents and the transfer.

[100] Section 15 and 15A of the Deeds Act, in part, respectively provide:

'15 **Preparation of deeds by conveyancer**

Except in so far as may be otherwise provided in any other law, no deed of transfer . . . shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer.

15A **Proof of certain facts in connection with deeds and documents by means of certificates**

(1) A conveyancer who prepares a deed or other document for the purposes of registration or filing in a deed registry, and who signs a prescribed certificate on such deed or document, accepts by virtue of such signing the responsibility, to the extent prescribed by regulation for the purposes of this section, for the accuracy of those facts mentioned in such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by regulation.

(2) . . .

(3) A registrar shall accept, during the course of his examination of a deed or other document in accordance with the provisions of this Act, that the facts referred to in subsection (1) in connection with the registration or filing of a deed or other document in respect of which a certificate referred to in subsection (1) or (2) has being signed, have for the purposes of such examination been conclusively proved: … .'

[101] Regulation 44A[14] to the Deeds Act, in relevant parts, requires:

'The person signing the preparation certificates prescribed by regulations 43 and 44(1) of the Regulations accepts, in terms of section 15A(1) and (2) of the Act, to the extent provided for in this regulation, responsibility for the correctness of the undermentioned facts stated in the deeds or documents concerned or which are relevant in connection with the registration or filing thereof, namely:

(a) . . .

(d) That, to the best of his knowledge and belief and after due enquiry has been made-

(i) . . .

(ii) in the case of a document referred to in regulation 44(1) – [15]

(aa) subject to the provisions of regulation 65,[16] the necessary authority has been obtained for the signing of such document in a representative capacity on behalf of a . . . close corporation . . . ;

(bb) the transaction as disclosed therein is authorised by and in accordance with the constitution, regulations, or founding statement . . . as the case may be, of any . . . close corporation . . . being a party to such document; . . . .'

[102] Ms de Wet, the sixth respondent, signed the preparation certificate in the customary top right-hand corner on the power of attorney. As the preparing

---

[14] Registration of Deeds Regulations, GN R474, *GG* 466 29 March 1963.

[15] Regulation 44(1) provides:

'(1) Subject to the provisions of subregulation (3), any power of attorney, application or consent required for the performance of an act of registration in a Deeds Registry . . . executed after the coming into operation of this regulation and tendered for registration or filing of record in a Deeds Registry, shall be prepared by a practicing attorney . . . notary or conveyancer, who shall make and sign a certificate in the undermentioned form in the upper right hand corner on the first page of the document concerned:

Prepared by me:

…….

ATTORNEY/NOTARY/CONVEYANCER

(Use whichever is applicable)

……..……

(State full name and surname in block letters).'

[16] Regulation 65(1) and (3) provide:

'(1) Any person seeking to pass . . . or to perform any other act in a Deeds Registry on behalf of any other person must, except as hereinafter provided or as provided in terms of the Electronic Deeds Registration System Act, lodge for filing with the Registrar the original power under which he claims to act.

(2) . . .

(3) A special power of attorney to transfer . . . land or other immovable property shall contain-

(a) a clear and sufficient description of such land or property;

(b) . . .

(c) . . . and

(d) in a power of attorney to transfer land, the date of disposal of such land.

conveyancer, she accepted responsibility for what it records, as provided in the regulations. She correctly recorded that Mr de Witt would be required to be authorised by the members ('lede') of Manyatta. If she genuinely believed that Mr de Witt was the only member, when she prepared and signed the power of attorney, her recording that he was required to be authorised by a resolution of members, contrary to her express instructions, and in conflict with the true factual position, would be untrue.

[103] The conveyancing respondents would also have prepared the resolution, although it does not require a formal preparation clause to be signed. The 'resolution' which has been produced required that it had to be signed by all the members of Manyatta. Yet, despite knowing that there was a plurality of members, not just Mr de Witt, that a resolution of members ('lede') was required, and that in accordance with the conveyancers own requirements, the resolution should be signed by all the members, this was not done and no further steps were apparently taken to ensure proper compliance. Indeed, as a matter of law, and being attorneys and conveyancing specialists, the resolution required would be a written resolution of all the members, carried by a 75 per cent majority, as required by s 46*(b)*(iv). The conveyancing respondents had to be satisfied on these facts, because that is what is legally required of them.

[104] No proper resolution has been produced. If one existed, it would have been produced with alacrity. That made the conduct of the conveyancing respondents and the reason for their omission to comply with what was required of them, all the more puzzling. They have not tendered any explanation for their conduct. It prima facie fell short of what can be expected of professional conveyancers and holds serious implications for the accuracy and reliability of our system of negative land registration and ownership. Causing transfer of the property to be registered, without ensuring that actual authority was properly in place, was prima

facie negligent, if not gross negligence, or possibly, in the absence of a credible explanation, possibly something worse.

[105] To a person, like the applicant, investigating how a situation could arise, where a power of attorney is filed in the Deeds Registry, signed by a preparing conveyancer and recording that the transfer has been authorised by a resolution of the members ('lede') of Manyatta, when it is common cause that there is no resolution of all the members, reasonably conveys a false misrepresentation. Had the conveyancing respondents carried out their responsibilities properly, this entire dispute would probably never have arisen.

[106] In the exercise of my judicial discretion on costs, no award of any costs should be made in favour of the conveyancing respondents in respect of the proceedings in the high court. An award of costs in their favour could risk being construed as some implied approval of their conduct. *A fortiori* (all the more so), there are no special circumstances which justify an award of costs on the attorney and client scale *de bonis propriis*.[17]

The fourth and fifteenth respondents - Nikifon and Odussee

[107] As regards the costs of Nikifon before the high court, its representative, Mr Richards' evidence that he did not know of the lack of authority of Mr de Witt to represent Manyatta, was not gainsaid. The applicant did not establish a sufficient basis to attribute the knowledge of Mr de Witt or the conveyancing respondents, to Nikifon. It follows that the applicant has not established objective grounds on which the allegations of fraud against Nikifon could be reasonably justified, thus justifying, that Nikifon's costs of the hearing of the application before the high court, be paid on the attorney and client scale. But that order should be confined to the application before the high court. There is, with respect,

[17] *Motlhaudi and Another v Rossouw and Others* (LCC 51/2000) [2001] ZALCC 23; [2001] 4 All SA (LCC) (18 June 2001).

no basis to carry it through to the appeal before this Court. Costs *de bonis propriis* are unusual, not easily awarded and awarded only in exceptional circumstances. They must be supported by the facts and there must be negligence 'of a severe degree'[18] and there must be a lack of bona fides and the person against whom such an order is made, must have acted unreasonably.[19] A mere error of judgment does not suffice.

Other possible considerations

[108] Some emphasis has been placed on the applicant having changed its line of argument from that advanced before the high court. This is not, with respect, a reason to award any punitive costs. Various different causes of action were available to be argued on the papers. There is no reason to award punitive costs simply because an argument, which was available to be argued and was argued, was unsuccessful.

[109] The notice of motion always conveyed that the applicant sought declaratory relief in paragraphs 1.1, 1.2, 1.3, 1.4, and 1.5. Indeed, the full court said that much. If those orders were granted, then the relief consequential thereto would be that in paragraphs 1.6 to 1.9. The same effect would necessarily follow upon a declaration of invalidity of the transfer, in terms of s 6 of the Deeds Act. That was not a change of tack. Issues often crystalise only during, or as the result of judicial debate.

[110] Further, the matter was not without some complexity. The high court, the full court and this Court have all decided the dispute on a different basis. That the issue has now crystalized and is decided on the basis of s 54(2) of the CC Act, does not render the previous lines of argument unreasonable. The high court and

---

[18] *South African Liquor Trader's Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) para 54.
[19] *Pheko and Others v Ekurhuleni Metropolitan City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 51.

the full court, four judges in total, grappled with the correct basis to decide this matter. The applicant is already punished for making the allegations of fraud against Nikifon, by the order to be substituted for that of the high court. No further punitive costs order is required.

[111] Once the fraud allegations were recorded in the affidavits, they stood as a fact, and the applicant could not remove them. He could only disavow further reliance on them. The full court did not consider what was argued before it as worthy of any censure, as it ordered only party and party costs against the applicant. There is no cross appeal against its costs order. Nikifon and Odussee were successful and are entitled to the costs of the appeal before this Court, as before the full court.

[112] I would have granted the following order:

1 The application for special leave to appeal the awards of costs on the attorney and client scale *de bonis propriis*, awarded by the high court against the applicant, is granted with costs, including the costs of two counsel;

2 Pursuant to the grant of special leave in paragraph 1 above, the appeal against the order of the full court is upheld in the respects set forth in paragraph 4 below, with costs, including the costs of two counsel;

3 The application for special leave to appeal the judgment of the full court, save as granted in paragraph 1 above, is otherwise dismissed with costs;

4 The order of the full court is substituted with the following:

‘(a) The appeal is, save to the extent set forth in paragraph (b) below, dismissed with costs.

(b) The order of the high court is set aside and substituted with the following:

(i) The application is dismissed;

(ii) The applicant is directed to pay the fourth and fifteenth respondents' costs on the attorney and client scale;

(iii) The applicant is directed to pay the costs of the ninth to eleventh respondents.'

5 The Registrar of the Mpumalanga high court is directed to submit a copy of the full appeal record and a copy of this judgment to the Director of Public Prosecutions, Mpumalanga, to consider the conduct and contents of the affidavit of Mr de Witt, specifically that he represented in the power of attorney that he was authorised by a resolution of the members of Manyatta Properties CC to pass ownership of the property to Nikifon (Pty) Ltd, when the indications are that this was not so, and whether any steps or proceedings should be taken against Mr de Witt.

P A KOEN

JUDGE OF APPEAL

Appearances

For the applicant:	R S Willis SC and C J C Nel
Instructed by:	J J Badenhorst & Associates Attorneys Incorporated, Roodepoort Lovius Block Attorneys, Bloemfontein
For the fourth and fifteenth respondents:	M P van der Merwe SC
Instructed by:	Braam van Rensburg Attorneys Inc, Mbombela Webbers Attorneys, Bloemfontein
For the fifth, sixth and seventh respondents:	
Instructed by:	J D Maritz SC Savage Jooste & Adams Inc, Pretoria Symington de Kok Attorneys, Bloemfontein.