# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Not Reportable**

Case No: 341/18

In the matter between:

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| **MOTO HEALTH CARE MEDICAL SCHEME** | **Appellant** |
| and | |
| **HMI HEALTHCARE CORPORATION (PTY) LTD** | **First Respondent** |
| **AGILITY GLOBAL HEALTH SOLUTIONS AFRICA (PTY) LTD** | **Second Respondent** |
| **JOHANNES ZACHARIAS HUMAN MULLER NO** | **Third Respondent** |
| **MICHAEL MMATHOMO MASILO NO** | **Fourth Respondent** |
| **MEDSHIELD MEDICAL SCHEME** | **Fifth Respondent** |
| **MASTER OF THE HIGH COURT** | **Sixth Respondent** |

**Neutral citation:** *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd & others* (341/2018) [2019] ZASCA 87 (31 May 2019)

**Coram:** Ponnan and Schippers JJA and Davis, Eksteen and Rogers AJJA

**Heard:** 6 March 2019

**Delivered:** 31 May 2019

**Summary:** Declaratory relief – whether condonation by liquidators of company of non-compliance with written notice of civil action under s

359(2)*(a)* of the Companies Act 61 of 1973 and prescription properly the subject of a declaratory order – party not entitled to claim declaration of rights merely because rights disputed – case not a proper one for the exercise of discretion to grant declaratory relief – delivery of heads of argument after hearing of appeal – abuse of court process.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Collis AJ, Mavundla and Basson JJ concurring, sitting as a court of appeal):

1 The application for leave to file the appellant's supplementary heads of argument is dismissed with costs on the scale as between attorney and client.

2 The appeal is dismissed with costs, including the costs of two counsel.

## JUDGMENT

**Schippers JA (Ponnan JA, and Davis, Eksteen and Rogers AJJA concurring):**

[1] In March 2013 the appellant launched an application in the Gauteng Division of the High Court, Pretoria (the high court) for a declaratory order, inter alia, that its claim against Calabash Health Solutions (Pty) Ltd (Calabash) for payment of the sum of R30 776 615 had not prescribed. The application was launched before the Superior Courts Act 10 of 2013 came into force in August 2013. It was therefore governed by s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, which provided that a provincial or local division of the former Supreme Court had the power:

'[I]n its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'[1]

[1] The position is now regulated by s 21(1)*(c)* of the Superior Courts Act 10 of 2013 which provides, inter alia, that a high court has jurisdiction in relation to all causes arising within its area of jurisdiction and has the power, 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future

[2] More than 70 years ago in *Durban City Council*,[2] Watermeyer JA, with reference to a similarly worded provision, said:

'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation" and then if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'

[3] The central issue in this appeal, with the special leave of this court, is whether the appellant had made out a proper case for the exercise of the high court's discretion to grant the declaratory relief sought.

**The facts and proceedings below**

[4] The appellant, Moto Healthcare Medical Scheme (Moto Health), established under the Medical Schemes Act 131 of 1998, is the medical fund of the Motor Industry Bargaining Council (MIBCO). In March 2007 MIBCO, acting on behalf of Moto Health, entered into a capitation agreement with Calabash, a company that specialised in rendering managed healthcare services for medical schemes (the capitation agreement). In terms of that agreement Moto Health agreed to pay monthly capitation fees to Calabash and in return, Calabash discharged all claims made by service providers in respect of services rendered to the beneficiaries of Moto Health.

[5] In September 2007 Moto Health cancelled the capitation agreement. Subsequently the parties entered into negotiations which culminated in a written settlement agreement on 1 April 2008 between MIBCO, Moto Health and

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or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[2] *Durban City Council v Association of Building Societies* 1942 AD 27 at 32; *Ex Parte Nell* 1963 (1) SA 754 (A) at 759A-B; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another, Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & others* 1995 (4) SA 1 (A) at 14F-I.

Calabash. Pursuant to the settlement agreement, in August 2008 Moto Health and Calabash accepted an audit report by Calabash's auditors that Calabash was indebted to Moto Health in the sum of R30 776 615.

[6] By registered letter dated 8 July 2009, Moto Health demanded payment of R30 776 615 from Calabash in terms of s 345 of the Companies Act 61 of 1973 (the 1973 Companies Act). The same day, ie 8 July 2009, Calabash was liquidated pursuant to a special resolution of its sole shareholder, the first respondent, HMI Healthcare Corporation (Pty) Ltd (HMI). On 28 July 2009 Calabash's attorneys replied to the s 345 letter and said that their client disputed liability for the debt of R30 776 615. Subsequently, Mr Johannes Muller (Muller) and Mr Michael Masilo of Tshwane Trust, the third and fourth respondents respectively, were appointed as the joint liquidators of Calabash.

[7] On 2 November 2009 Moto Health instituted an action in the high court against Calabash for payment of R30 776 615, together with interest and costs (the action). The summons was served on 6 November 2009 at the *domicilium citandi et executandi* expressly chosen by Calabash in terms of the settlement agreement. It is common ground that Moto Health did not give the liquidators written notice of its intention to institute the action, as required by s 359(2)*(a)* of the 1973 Companies Act (the requisite notice).[3] This was due to the fact that Moto Health was unaware that Calabash had been placed in liquidation when the action was instituted.

[3] Section 359(2)(*a*) provides:
'Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.'

[8] On 6 November 2009 Moto Health's former attorneys, Werksmans Inc (Werksmans), discovered that Calabash had been placed in voluntary liquidation. They enquired of Calabash's attorneys whether (a) they were still acting for Calabash; (b) the date of Calabash's voluntary liquidation; and (c) whether the first and second meeting of creditors had been convened. On 17 November 2009 Calabash's attorneys confirmed that it was in voluntary liquidation and advised Werksmans to communicate with Muller.

[9] On 19 November 2009 Werksmans wrote to Tshwane Trust, advising it that Moto Health had issued summons against Calabash and asked whether Muller had been appointed as the liquidator and whether the first and second meeting of creditors had been convened. Muller replied on 23 November 2009. He asked for a copy of the summons and suggested that a meeting be convened with Werksmans and its client so that he could take advice as to whether the action should be opposed. Subsequently, Werksmans provided Muller with a copy of the summons and its annexures. Later their mandate was terminated by Moto Health.

[10] On 1 December 2009 Mr Werner Barnard (Barnard) and Mr Johan Crouse (Crouse) of Barnard Inc, the new attorneys acting for Moto Health, met with Muller. Barnard advised Muller that Moto Health intended to take default judgment against Calabash. Muller responded that the liquidators did not intend to oppose the action unless they received instructions to the contrary from the general body of creditors. The liquidators apparently were of the view that Calabash possibly had a counterclaim, but they did not intend to pursue it. Muller confirmed that the first and second meeting of creditors had already been convened and that HMI and the second respondent, Agility Global Health Solutions Africa (Pty) Ltd (Agility), a wholly-owned subsidiary of HMI, had

proved claims in the amounts of approximately R3.5 million and R9 million respectively.

[11] On the same day Barnard wrote to Muller and requested, inter alia, the minutes of the first and second meetings of creditors, financial statements of Calabash for 2007, 2008 and 2009 and copies of Calabash's bank statements for the 12 months preceding its liquidation. On 15 January 2010 Muller advised Barnard that he was gathering the documentation and suggested that a special meeting be convened for Moto Health to prove a claim. Subsequently Muller advised Barnard that Calabash refused to grant Moto Health access to its books and records until Moto Health proved a claim. However, Moto Health did not prove a claim in the insolvent estate.

[12] In November 2011 Moto Health learnt of certain allegations made in an affidavit by Mr Martin Rimmer, a director of Calabash and HMI, in an application in the high court under case number 17480/2011 by HMI and Agility to stay an insolvency enquiry into the affairs of Calabash. These allegations were that Moto Health's claim against Calabash had prescribed because Moto Health had not complied with s 359 of the 1973 Companies Act, the summons had not been served on the liquidators of Calabash and Moto Health had elected not to prove a claim against Calabash.

[13] By letter dated 5 April 2012 to Tshwane Liquidators, Barnard informed them that his firm had been instructed to intervene on behalf of Moto Health in the application under case number 17480/2011, but that HMI and Agility had alleged that his client was not an interested party because its claim against Calabash had prescribed. Barnard recorded the discussion between himself, Crouse and Muller on 1 December 2009 in which it was said that the liquidators did not intend to oppose Moto Health's action against Calabash. Barnard went

on to say that the liquidators, by their conduct, had waived the right to receive the requisite notice and condoned the institution of the action against Calabash without that notice. The liquidators were advised that if they disagreed, Moto Health would apply to court for a declaratory order to that effect.

[14] In his reply dated 16 April 2012, Muller did not dispute Barnard's version of events at the meeting of 1 December 2009. He advised Barnard that he was willing to convene a special meeting of creditors so that Moto Health could prove its claim and once it had done so, it would have *locus standi* to intervene in the application of HMI and Agility. Moto Health said that it was reluctant to prove a claim in Calabash's liquidation without evidence of some prospect of recovery. It stated that in December 2012 it had obtained information concerning alleged voidable dispositions by Calabash to HMI and Agility indicating such a prospect, which caused it to take the further steps it did in 2013.

[15] On 22 March 2013 Moto Health applied to the high court for the following orders against the liquidators (the first and second respondents in that application):

'1 Declaring that the first and second respondents waived the requirement of written notice required in terms of section 359(2)(*a*) of the Companies Act 61 of 1973 ("the Companies Act") before the applicant could institute action against Calabash Health Solutions (Pty) Ltd ("Calabash") in the above honourable Court under case number 67638/2009.

2. *Alternatively to prayer 1*, declaring that the first and second respondents condoned the applicant's failure to deliver a written notice required in terms of section 359(2)(*a*) of the Companies Act before the applicant could institute action against Calabash in the above honourable Court under case number 67638/2009.

3. *Alternatively to prayers 1 and 2*, condoning, in terms of section 359(2)(*b*) of the Companies Act, the applicant's failure to provide written notice in terms of section 359(2)(*a*)

of the Companies Act before the applicant instituted action against Calabash in the above honourable Court under case number 67638/2009.

4. Declaring that the applicant's claim in the sum of R30,776,615.00 together with interest *a tempore morae* and legal costs that form the subject of the action instituted against Calabash in the above honourable court under case number 67638/2009 has not prescribed.

5. Granting the applicant leave to pursue the action against Calabash in the above honourable court under case number 67638/2009 to judgment.'

[16] The liquidators delivered a notice of intention to oppose the application but did not file an answering affidavit. HMI and Agility, who were also cited in the application, opposed it. They contended that the summons was not properly served, that it did not interrupt the running of prescription and therefore that Moto Health's claim had prescribed. They alleged that there was no basis to conclude that the liquidators had waived receipt of the requisite notice or condoned Moto Health's failure to deliver it; and that the failure to give the requisite notice rendered the action void *ab initio*.

[17] The high court (Pretorius J) found that HMI and Agility did not have *locus standi* to oppose the application in circumstances where the liquidators, on behalf of Calabash, had elected not to do so. Pretorius J concluded that the summons was properly served at Calabash's chosen *domicilium citandi et executandi*; that the liquidators had 'waived their right by their conduct'; and that they 'had condoned the applicant's failure to inform them in writing in terms of s 359(2)'. Pretorius J made an order declaring that the liquidators had condoned Moto Health's failure to deliver the requisite notice before it instituted the action; and that its claim for payment of R30 776 615, together with interest and costs, had not prescribed. HMI and Agility were ordered to pay the costs of the application. They were however granted leave to appeal to a full court.

[18] The full court (Collis AJ, Mavundla and Basson JJ concurring) upheld the appeal by HMI and Fidelity, set aside the order of Pretorius J and replaced it with an order dismissing Moto Health's application with costs. The full court decided the appeal on the sole basis that service of the summons in the action was invalid. It concluded that any relief sought premised on the invalid service of the summons could not have been granted by Pretorius J.

**No proper case for declaratory relief**

[19] As appears from prayers 1, 2 and 3 of the notice of motion quoted above, Moto Health sought an order declaring that the liquidators had waived the right to receive the requisite notice; alternatively, that they condoned Moto Health's failure to deliver it; further alternatively, that the failure to give the requisite notice be condoned in terms of s 359(1)*(b)* of the 1973 Companies Act.

[20] On the facts of this case, a declaratory order in terms of prayers 1, 2 or 3 was inappropriate. On its own version, as early as the meeting of 1 December 2009 when Muller told Barnard that Moto Health was going to take default judgment in the action, Muller replied that the liquidators did not intend to defend the action unless the general body of creditors decided otherwise. By that time Muller had already received a copy of the summons. Moreover, it appeared to Barnard that the liquidators were of the view that Calabash possibly had a counterclaim, but that they did not intend to pursue it.

[21] However, Moto Health did not apply for default judgment. Its reasons for not doing so are not apparent from the papers. Had it pursued the action in the ordinary course and applied for default judgment, it is unlikely that the liquidators would have opposed those proceedings. This, in the light of Muller's statement that the liquidators – the only persons who could have raised the s

359(2) defence – would not have defended the action, and the fact that they did not oppose the declaratory relief sought by Moto Health.

[22] Instead, more than two years later in April 2012, Barnard confirmed what happened at the meeting of 1 December 2009 and that the liquidators, by their conduct, had either waived the right to receive the requisite notice or condoned Moto Health's non-compliance with s 359(2)*(a)* of the 1973 Companies Act. The liquidators were specifically informed that if they disputed Barnard's version of events, Moto Health would apply to court for declaratory relief. As it turned out, the liquidators did not dispute Barnard's version.

[23] This, of course, is not to say that the liquidators waived their right or condoned non-compliance with s 359(2)*(a)* of the 1973 Companies Act, which, as stated, provides that a person who intends to institute legal proceedings to enforce any claim against a company shall within four weeks after the appointment of the liquidator, give the liquidator not less than three weeks' written notice before commencing the proceedings. That however is not an issue which this court need decide. What the facts show is that Moto Health's approach to the high court for the orders in prayers 1, 2 and 3 of the notice of motion was unnecessary. Indeed, counsel for Moto Health had difficulty in explaining why that relief was sought despite the liquidators' stance and their failure to dispute or contradict the events of 1 December 2009.

[24] So, on the s 359(2)*(a)* issue there was no existing or concrete dispute between Moto Health and the liquidators. Muller, on behalf of the liquidators, did not at any stage object to the action, either on the basis that they did not receive prior notice of it, or that they had to be given three weeks to consider the action. Although an existing dispute is not a prerequisite for the exercise by a court of its jurisdiction to grant declaratory relief, the absence of such a

dispute may, depending on the circumstances, cause the court to refuse to exercise that jurisdiction.[4]

[25] This is such a case. It concerns only Moto Health and the liquidators, and does not involve the determination of a legal principle affecting third parties.[5] Moto Health did not meet the requirements at the first stage of the enquiry as to whether declaratory relief should be granted and on this basis alone, the order that the liquidators had condoned non-compliance with the requisite notice should not have been made.

[26] Apart from this, Moto Health was not entitled to a declaratory order merely because HMI and Agility had disputed its right to pursue the action without the requisite notice. This principle was stated a century ago by Innes CJ in *Geldenhuys*[6] (affirmed by the Constitutional Court in *Mukhamadiva*[7] in 2014) as follows:

'It was laid down by DE VILLIERS CJ in *Colonial Government v Stephan* (17 SC 39) that a plaintiff is not entitled to claim a declaration of rights merely because their rights have been disputed by the defendant; he must prove some infringement of them. . . . No doubt there is something to be said in favour of sanctioning the issue of declaratory orders even where there has been no infringement of rights. But on the other hand it would be very difficult to define the limits within which that jurisdiction should be confined. And its unregulated exercise would lead to great uncertainty of practice. After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.'

[4] *Ex Parte Nell* fn 2 at 759H-760 B; *Shoba* fn 2 at 14F-G.
[5] Compare *Ex Parte Nell* fn 2 at 759H-760A.
[6] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 440-441.
[7] *Director-General Department of Home Affairs & another v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) para 33.

[27] In *Barlows Tractor*,[8] Harms JA stated that s 359(2) provided a defence in the hands of the liquidator who was not obliged to raise it. It is not a matter which can be raised by outsiders (such as, here, HMI and Agility) for whose benefit and protection s 359(2) was not enacted. Pretorius J having found, correctly, in my view, that this provision applies to a liquidator who is the party affected by non-compliance, it was not appropriate to issue a declaratory order that the liquidators had condoned Moto Health's failure to deliver the requisite notice: there was no dispute in that regard between Moto Health and the only other parties who mattered (the liquidators), nor was there an infringement of Moto Health's rights by HMI or Agility. Given that there was no dispute between the liquidators and Moto Health concerning non-compliance with s 359(2), the high court pronounced upon an abstract question and furnished advice on differing contentions.

[28] Likewise, the high court decided an abstract question when it issued a declaratory order that Moto Health's claim had not prescribed. Prescription, as a defence, is underpinned by the Prescription Act 68 of 1969. That Act requires prescription to be invoked by a party to litigation. Thus, s 17 of the Prescription Act provides:

'(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed

of record in the proceedings: provided that a court may allow prescription to be raised at any stage of the proceedings.'

[29] But prescription was not raised as a defence in the action. Moto Health sought the relief in paragraph 4 of the notice of motion on the basis of an assertion that its claim had prescribed, by a director of Calabash in completely

[8] *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 (A) at 884F-G.

different proceedings to which Moto Health was not a party. We were referred to no authority that would entitle a litigant, as a pre-emptive strike to a plea of prescription, to approach a court for a declaratory order that a claim has not prescribed. This is hardly surprising given the provisions of s 17(2) of the Prescription Act. Further, this case illustrates the very uncertainty of practice that would result if the issuance of declaratory orders were unregulated, which Innes CJ cautioned against in *Geldenhuys*.[9]

[30] It must however be emphasised that whilst it is not necessary for this court to decide whether service of the summons in the action was valid, the decision of Pretorius J or the full court must not be regarded as dispositive of that issue. The import of this judgment is that neither of those courts should have pronounced on the issue.

**The application to file further submissions**

[31] After the hearing of the appeal, and without the leave of this court, Moto Health delivered supplementary heads of argument on 15 March 2019 (the supplementary heads) dealing with certain issues raised by the court, namely whether there were any special circumstances why the appeal should be heard; whether there were any triable issues; and whether Pretorius J ought to have granted the declaratory relief sought in paragraphs 2 and 4 of the notice of motion.

[32] Pursuant to receipt of the supplementary heads on 18 March 2019, the attorneys acting for HMI and Agility addressed a letter to the registrar of this court in which they raised the following complaints. The court did not request the parties to submit further heads of argument, neither did Moto Health apply for leave to do so. During argument Moto Health's counsel was specifically

[9] *Geldenhuys* fn 12 at 441.

given an opportunity to consider the points raised by the court and take instructions in relation thereto. The supplementary heads sought to introduce argument on matters not raised by the court. HMI and Agility would be prejudiced in that Moto Health was seeking 'a second opportunity to argue the appeal'.

[33] Consequently, on 20 March 2019 Moto Health applied to this court for leave to file the supplementary heads and a directive that HMI and Agility be granted leave to file additional heads of argument in reply to the supplementary heads. HMI and Agility opposed the application. The grounds for the application in the founding affidavit were essentially that the issues raised with counsel 'did not arise on the papers' and 'had not been anticipated by counsel'.

[34] These grounds however have no merit. The high court had issued two declaratory orders and whether that was appropriate in the circumstances, were plainly matters for debate and decision by this court on appeal. So too, the question whether Moto Health had made out a case for the grant of special leave to appeal. Once again it is necessary to say that an order granting special leave to appeal on application is not decisive of that question, which ultimately must be decided by the court itself when hearing the appeal.[10]

[35] At the hearing of the appeal, Moto Health's counsel was informed on two occasions that the matter could stand down to give them an opportunity to consider the issues raised by the court and take instructions in regard thereto. On the first occasion Moto Health's senior counsel indicated that he would proceed with argument and then presented comprehensive argument in relation to the points raised by the court. Thereafter counsel for HMI and Agility

[10] *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* [2011] ZASCA 74; [2011] 11 BLLR 1041 (SCA) para 15.

presented argument on those points. Moto Health was given a second opportunity to consider its position when its senior counsel presented argument in reply. That opportunity was declined and no request to file further submissions was made. So the statement in the founding affidavit that '[i]t was only after the appeal hearing that appellant's counsel had a proper opportunity to reflect on the issues', is untenable. Judgment was reserved and the court adjourned. Nine days later Moto Health delivered the supplementary heads.

[36] The contention that the issues raised by the court were not anticipated by counsel is surprising. The debate in the court of first instance centred on the appellant's entitlement to the declaratory relief granted by Pretorius J. Nothing in that debate ought to have taken counsel by surprise. What is impermissible is delivery of heads of argument after the hearing when counsel has 'reflected on the issues', as happened in this case. One shudders to think of the consequences if this were permitted. Courts would be flooded with applications to receive additional heads of argument, filed 'upon reflection' after a hearing.

[37] It was contended that the parties had not been notified beforehand of the issues raised by the court at the hearing of the appeal. In this regard the dictum of Harms JA in *Thompson*,[11] in my view, provides a complete answer:

'The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the Court will not be able to function.'

[38] It was also contended on behalf of Moto Health – unsurprisingly without reference to any authority – that it was 'in the interests of justice' that the supplementary heads be received. This contention likewise has no merit. The supplementary heads were filed without more. An application for leave to file

[11] *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7. vc

the heads was made only after the registrar had informed Moto Health's attorneys that such an application was necessary, and HMI and Fidelity had objected to delivery of the heads. Save for brief submissions dealing with the power of an appellate court to raise a new point of law on appeal, the supplementary heads contain an extensive analysis of precisely the same authorities referred to in Moto Health's original heads of argument. All of this was an abuse of the process of this court. In the result, the judgment in this case – which had been prepared by the time that the application to file the supplementary heads was made on 20 March 2019 – could not be handed down at the end of the first term on 29 March 2019.

[39] As stated in *Standard Credit Corporation*,[12] approved by this court in *Beinash*,[13] an abuse of the process of court takes place where a litigant uses court procedures for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings. The fact that the judgment could not be delivered and the case brought to finality at the end of March 2019 was prejudicial to this court, the administration of justice, HMI and Agility. In *Hudson*,[14] De Villiers JA said that courts are duty bound to put a stop to an abuse of process:

'When … the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

[40] It follows that the application for leave to file the supplementary heads must be dismissed and that the punitive costs order sought by HMI and Agility is justified in the circumstances.

[12] *Standard Credit Corporation Ltd v Bester & others* 1987 (1) SA 812 (W) at 820A-B.
[13] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734.
[14] *Hudson v Hudson & another* 1927 AD 259 at 268.

[41] For all of these reasons the appeal must fail. There is no reason why costs should not follow the result. The following order is issued:

1 The application for leave to file the appellant's supplementary heads of argument is dismissed with costs on the scale as between attorney and client.

2 The appeal is dismissed with costs, including the costs of two counsel.

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A Schippers

Judge of Appeal

APPEARANCES

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| For Appellant: | K W Lüderitz SC with TD Prinsloo |
| | Instructed by: |
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