IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 08/7872

In the matter between:

ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD Applicant

and

MITCHELL COTTS PENSION FUND
(in liquidation, herein duly represented by its liquidator A L Mostert N.O.) First Respondent

LUCAS SOUTH AFRICA PENSION FUND
(in liquidation, herein duly represented by its liquidator AA L Mostert N.O.) Second Respondent

PICBEL-GROEPVOORSORGFONDS
(under curatorship, herein duly represented by its curators A L Mostert N.O., J D Pema N.O. and D J Wandrag N.O.) Third Respondent

DATAKOR PENSION FUND
(under curatorship, herein duly represented by its curators A L Mostert N.O., D J Wandrag N.O. and S S Mphahlele N.O.) Fourth Respondent

DATAKOR RETIREMENT FUND
(under curatorship, herein duly represented by its curators A L Mostert N.O., D J Wandrag N.O. and S S Mphahlele N.O.) Fifth Respondent

CORTECH PENSION FUND
(under curatorship, herein duly represented by its

curators A L Mostert N.O., D J Wandrag N.O. and S S Mphahlele N.O.) Sixth Respondent

SABLE INDUSTRIES PENSION FUND
(under curators, herein duly represented by its Curator A L Mostert N.O.) Seventh Respondent

In re:

MITCHELL COTTS PENSION FUND
(in liquidation, herein duly represented by its liquidator A L. Mostert N.O.) First Plaintiff

LUCAS SOUTH AFRICA PENSION FUND
(in liquidation, herein duly represented by its liquidator A L Mostert N.O.) Second Plaintiff

PICBEL-GROEPVOORSORGFONDS
(under curatorship, herein duly represented by its curators A L Mostert N.O., J J Pema N.O. and D J Wandrag N.O.) Third Plaintiff

DATAKOR PENSION FUND
(under curatorship, herein duly represented by its curators A L Mostert N.O., D J Wandrag N.O. and S S Mphahlele N.O.) Fourth Plaintiff

DATAKOR RETIREMENT FUND
(under curatorship, herein duly represented by its curators A L Mostert N.O., D J Wandrag N.O. and S S Mphahlele N.O.) Fifth Plaintiff

CORTECH PENSION FUND
(under curatorship, herein duly represented by its curators A L Mostert, D J Wandrag N.O. and S S Mphahlele N.O.) Sixth Plaintiff

SABEL INDUSTRIES PENSION FUND
(under curatorship, herein duly represented by its curator A L Mostert N.O.) Seventh Plaintiff

and

ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD Defendant

J U D G M E N T

ROOS, AJ:

[1] In this matter there are three interlocutory applications before me. They are an application to compel further particulars for trial, an application to compel a response to a Rule 35(3) Notice and an application in terms of Rule 13(3) for leave to serve third party notices after the close of pleadings.

[2] I shall deal with the applications in the order in which they were argued.

The Rule 21(4) application

[3] This application was launched on 8 October 2009. The applicant sought an order directing the respondents to comply with its request for further particulars served on 17 September 2009 within ten days of the order being served on the respondents. It also sought leave to approach the court on the same papers to seek dismissal of the respondents' claims if the respondents failed to timeously comply with the order and it sought costs.

[4] The founding affidavit deposed to by C F Adendorff the applicant's attorney consists of four paragraphs. In the first paragraph he states his

capacity and that the facts are within his personal knowledge. The second, third and fourth paragraph read as follows:

> "2. On 17 September 2009, the applicant's request for further particulars for trial in terms of rule 21(2), was served on the respondents' attorneys of record. A copy of the said request for further particulars for trial is annexed hereto as 'A1'.
>
> 3. The respondents had until 05 October 2009 to furnish their answer to the applicant's request for further particulars for trial, but have failed to do so.
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> 4. The trial in this matter is set down for 29 April 2010 and the applicant requires further particulars to prepare for the trial."

[5] The request for particulars which is attached to the application is 55 pages long.

[6] The respondents opposed the application. Attached to the answering affidavit which was deposed to by the attorney acting for the respondents was a letter addressed by such attorney to the applicant's attorney on 5 October 2009. The relevant portion of the letter reads as follows:

> "3. Your client's request for further particulars comprises 55 pages together with an extensive Notice in terms of Rule 35(3), requires consideration of a vast amount of documents and is time consuming. You will also appreciate that we act on behalf of all of the Plaintiffs comprising 7 separate entities, each with its own records and unique circumstances to consider. We believe that any application to compel would be premature.
>
> 4. We will hopefully be in a position to file our clients' response by the end of this week or early next week. Should you carry out your client's instructions to launch an application to compel, we shall bring the aforesaid circumstances to the attention of the court on 13 October 2009."

[7] In a further letter addressed by the respondents' attorney to the applicant's attorney on 6 October 2009 a copy of which letter is also attached to the answering affidavit the attorney states that the applicant is not entitled to the particulars sought and then says the following:

> "As previously indicated, we are nonetheless in the process of formally responding thereto, without prejudice to any of our clients' rights."

[8] In contrast to the perfunctory founding affidavit the applicant filed a replying affidavit 18 pages long. In it the deponent Adendorff who had also deposed to the founding affidavit attempted to justify the manner in which the application was launched and to set out why the applicant was entitled to the relief sought.

[9] What is required to be established in an application in terms of Rule 21(4) was dealt with in the *Szedlacsek* case.[1] Leach J (as he then was) said the following:

> "It is trite that rules are there for the court not the court for the rules and this court must zealously guard against its rules being abused particularly by the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation but which appear to be designed merely to inflate costs to the advantage of a practitioner's pocket.
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> This must be borne in mind in considering the provisions of Rule 21. Under Rule 21(2) after the close of pleadings a party may deliver a

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[1] *Szedlacsek v Szedlacsek*, *Van der Walt v Van der Walt* and *Warner v Warner* 2000 (4) SA 147 (ECD).

notice requesting '… only such further particulars as are strictly necessary to enable him to prepare for trial' which request is to be complied with within ten days. Rule 21(4) then goes on to provide:

> '(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence *whereupon the court may make such order as to it seems meet*.'

It is clear from the final words of this subrule emphasised in italics above that this court retains a discretion to grant or refuse an order for the delivery of further particulars. An applicant is accordingly not entitled to an order compelling a reply as of right should the opposing party fail to deliver further particulars timeously or sufficiently but must set out sufficient information to enable the court to consider whether or not to exercise its discretion in his favour. It is impossible to lay down any test which can be slavishly applied to determine whether an order compelling delivery should be granted as each case must turn upon its own particular facts and circumstances but it seems to me that in most cases it would probably be wholly insufficient for a party seeking relief under Rule 21(4) to rely solely upon the other party's failure to timeously comply with the ten day time period laid down by Rule 21(2).

Furthermore in my opinion although there is no specific requirement for an applicant proceeding under Rule 21(4) to give notice of his intention to bring an application under that subrule (that having been the case even prior to the repeal of Rule 30(5) which required that notice to a defaulting party be given of an application for an order compelling compliance with a notice or request …) it is of course sound practice for a party to call upon his opponent to remedy a default or failure to timeously comply with a request for particulars for trial and to put him to terms before leaping into court and incurring substantial costs in an application of this nature. Accordingly a court will be slow to come to a party's aid by granting an order directing the opposing party to comply with a notice or request where no such earlier demand has been made. In my view an application to compel compliance with a procedural step should really be regarded as a last option to be exercised when other reasonable and far less costly alternatives had been unsuccessful and the defaulting party has shown himself to be unreasonably dilatory."[2]

I respectfully associate myself with Leach J's views.

[10] As can be seen from the founding affidavit quoted above the applicant relies solely upon the respondents' failure to timeously comply with the 10 day

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2 At 149G-150G.

time period laid down by Rule 21(2) for the relief it seeks. It sets out no facts whatsoever to enable the court to consider whether or not to exercise its discretion in its favour. In particular it does not set out any reasons why the undertakings given on behalf of the respondents to respond to the request for particulars was not adequate or sufficient. In my judgment it is not entitled to attempt to make out a case in the replying affidavit. The application must accordingly be dismissed.

The Rule 35(7) application

[11] This application appears to have been launched on the same date as the application in terms of Rule 21(4). The founding affidavit is also deposed to by C F Adendorff. It follows the same format as the founding affidavit in the Rule 21 application and merely sets out that a Rule 35(3) notice has been served, that the respondents had until 5 October 2009 to respond thereto and that they had not done so. Again the affidavit sets out no information to enable the court to consider whether or not to exercise its discretion in the applicant's favour.

[12] Leach J held in the *Szedlacsek* case that the comments that he made in relation to an application under Rule 21(4) were equally applicable to an application under Rule 35(7).[3] Accordingly this application also falls to be dismissed.

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[3] At 151H.

[13] There is another reason however why the application cannot succeed. The application was served on the respondents' attorney on 7 October 2009. On 13 October 2009 the respondents served a response to the applicant's Rule 35(3) notice. Although it served a notice of intention to oppose the application to compel on 12 October 2009 it did not file an answering affidavit. At best for the applicant if it had approached the court with its application after the respondents' Rule 35(3) response had been received it might have been able to argue that it was entitled to the costs of the application. Instead what it did was to file a replying affidavit of 20 pages (also deposed to by Adendorff) to which was annexed annexures running to 62 pages.

[14] It is difficult to understand what purpose the replying affidavit was supposed to serve or what it purported to be a reply to bearing in mind that no answering affidavit had been filed. What the applicant purported to do was to set out in the replying affidavit why it was entitled to certain documents that it had requested from the respondents and which had not been made available in the response received from the respondents. In effect through the replying affidavit it sought to launch a new application requiring the court to order the respondents to provide a further and better response to the Rule 35(3) request without either a notice of motion or a founding affidavit. In my view it was not entitled to do so and the procedure it followed was irregular. The respondents would in my view have been entitled to give the applicant notice in terms of Rule 30 of the irregular step and to require it to remove the cause of complaint within 10 days. Apparently no such notice was given.

The Rule 13 application

[15] In this application the applicant sought the court's leave to serve third party notices on the persons listed in an annexure to the application to join them as third parties in the action. The court's leave was required in terms of Rule 13(3)(b) because the relevant notices had not been served prior to the close of pleadings. The applicant also sought leave in terms of section 2(4)(b) of the Apportionment of Damages Act No. 34 of 1956 (the AOD Act) for the institution of third party proceedings for a conditional contribution under subsections 2(6) and (7) of the Act against certain of the third parties. It also sought an order that the third party notices could be served by way of substituted service on two of the third parties. The annexure attached to the notice of motion listed 24 parties on whom the third party notices were to be served.

[16] An applicant seeking an order in terms of Rule 13(3)(b) is required to furnish a satisfactory explanation for his failure to give the notice before close of pleadings and to make out a *prima facie* case against the person he seeks to sue by alleging facts which if established at the trial would entitle him to succeed.[4]

[4] See *Wapnick and Another v Durban City Garage and Others* 1984 (2) SA 414 (D) at 424B-C; *Niemand v S A Eiendomsbestuur SWD (Edms) Bpk en 'n Ander* 1985 (2) SA 710 (C) at 712; *Padongelukkefonds v Van den Berg en 'n Ander* 1999 (2) SA 876 (O) at 885J-886B; *Mercantile Bank Ltd v Carlisle and Another* 2002 (4) SA 886 (W) at 888H-889A.

[17] In my view it would not suffice for an applicant to satisfy only one of the requirements. Unless both the requirements can be satisfied leave should not be granted.[5] Although the *Chetty* case set the requirements in relation to an application for a rescission of a judgment the same principles in my view also apply to an application in terms of Rule 13.

[18] The *prima facie* case must be weighed in the light of the totality of the available facts to enable the court to determine whether the claim which the applicant wishes to pursue against the third parties it wishes to join could ever succeed. In considering the application it must be borne in mind that the purpose of the rule is to prevent a multiplicity of actions and a lenient approach should be adopted. If however on the facts that are available the case against the third parties the applicant wishes to join is totally unfounded the joinder should be refused.[6]

[19] The applicant's failure to join the third parties before the close of pleadings is explained in the following manner:

> "*69. The applicant's legal representatives debated the issue of joining the joint wrongdoers at some length. Eventually senior counsel's advice to adopt a cautious approach and not to immediately join anybody was followed. This advice was explained with reference to a number of issues, the most important being that greater clarity on the future course of the matter had to be obtained. It was considered necessary to first establish whether it would be more beneficial to join the third parties in this action, or sue them separately in later actions, if at all necessary. In particular, the applicant was advised to first go*

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5 *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-F.

6 *Mercantile Bank v Carlisle (supra*) at 889E-H.

through the discovery process, particularly with a view of establishing the terms of any settlements Mostert had concluded with the joint wrongdoers. At that stage it was considered more probable than not that Mostert would settle on the basis that restitution be effected. The applicant was advised that it might be counter-productive to involve such a large number of joint wrongdoers, resulting in an unwieldy and impractical matter, if such joinder could realistically be avoided. Based on this advice, the applicant resolved not to join any third parties at that stage, but to proceed with the preparation of the action and, if later so advised, to launch this application for leave to join third parties.

70. *Joining third parties was thus always foreseen as a possibility, hence the section 2(2)(b) notices. Prior to close of pleadings, however, it was unsure whether it would be feasible to join such a large number of third parties. It was also unsure whether it would be necessary to ever sue them, for it was considered that many of them might restore what they had received. For instance, Mostert sued Lifecare Fund and Lifecare Company for the full amount of the first respondent's alleged damages during May 2007. But the direction in which the Mostert approach sent this action, has made suing them an absolute certainty. This is so, for if not, the applicant will end up paying amounts actually received by some of these third parties and which Mostert will allow them to retain, or in the case of entities vicariously liable, which Mostert will not pursue for the full amount of their liability.*

71. *I have been advised and verily believe that it has now become necessary to join the mentioned third parties. This is as a consequence, in the main, of knowledge acquired since the action was instituted. The action is affected by ongoing events, in the main settlements reached between Mostert and joint wrongdoers, and by convictions of joint wrongdoers pursuant to plea and sentence agreements concluded with the State. Again I offer the example of Pickard. Prior to the settlement between him and Mostert the expectation that he and the others that benefitted from receipt of the assets, would repay everything they had received, would have been considered reasonable. The expectation is at least borne out by the R10 million additional liability he has agreed to. Since there has not been full restitution, the need to join the Pickard parties in these proceedings is manifest. The same reasoning applies to the other proposed third parties.*"

[20] In essence the applicant therefore says that it took the decision not to join the third parties timeously pursuant to advice it received from senior counsel acting on its behalf. It contends however that that advice has changed because of knowledge acquired since the action was instituted and because Mostert (the curator acting on behalf of all the respondents) has reached settlement agreements with various parties in terms of which Mostert has agreed to accept payment from such parties of less than the full amount that the applicant contends was due by such parties.

[21] I have serious reservations about whether an applicant who has made a conscious and informed decision not to join a third party can escape the consequences of his decision merely by saying that it has changed its mind because of changed circumstances. In this sense the explanation provided by the applicant for its failure to serve the third party notices timeously is not as satisfactory as it maybe should have been. However, given that I must adopt a lenient approach I shall accept that there is at least an explanation before me by the applicant for its failure to issue the third party notices timeously. It remains therefore to consider whether the applicant has made out a *prima facie* case against the third parties that it wishes to join.

[22] The claim of each of the respondents (as plaintiffs) against the applicant (as defendant) is based on allegations which can be summarised as follows:

22.1 The applicant was a pension fund administrator that administered the various pension funds of the respondents.

22.2 The applicant was responsible for applying for and obtaining certificates in terms of section 14 of the Pension Funds Act 24 of 1956 (the PF Act) which resulted in the removal of each of the plaintiffs' fund's assets.

22.3 Once the certificates in terms of section 14 of the PF Act had been obtained the plaintiffs were deprived of the assets from their funds because thereafter the assets vested in a different fund ie. the Lifecare Fund by virtue of section 14(2) of the PF Act.

22.4 But for the applicant's conduct in applying for and obtaining the section 14 certificates the assets of the various plaintiffs' funds would have remained vested in such funds.

[23] The defence that the applicant has pleaded on the merits is that when the Registrar of Pension Funds forwarded the section 14 certificates that the assets of the various plaintiffs' funds vested in and became binding upon the Lifecare Fund. The defendant pleads further that the plaintiff funds cannot claim damages from the defendant because the section 14 certificates remain valid and binding. It pleaded further in the alternative that should the defendants' unlawful conduct be held to have resulted in the unlawful

alienation of the plaintiffs' funds assets that the plaintiffs' claims are limited to that which cannot be recovered from the unlawful recipients of such assets.

[24] On a conspectus of the particulars of claim,the defendant's plea, the founding affidavit and the third party notices it is clear that the plaintiffs' claim is based on the contention that it was solely the conduct of the applicant that caused the loss to the various plaintiffs. The claims are based on the defendant's conduct in applying for and obtaining the section 14 certificates. Once the section 14 certificates had been issued the funds of the various plaintiffs vested in the Lifecare Fund by operation of law in terms of section 14(2) of the PF Act.

[25] It is apparent from the defendant's draft annex to the notice to the third parties that the defendant contends that:

> "The first to sixth third parties are joint wrongdoers as they are the recipients of the first plaintiff's assets."

It is apparent from the allegations made that such assets are alleged to have been transferred by the Lifecare Fund after the assets vested in it pursuant to the issue of the section 14 certificate. What happened to the funds after such funds vested in the Lifecare Fund does not form part of the plaintiffs' claim. If an unlawful transfer occurred from the Lifecare Fund to any of the alleged recipients of such funds then the right to recover such funds is a separate issue and must be based on a

different cause of action. It cannot constitute a proper basis for a finding that any of the recipients of funds from the Lifecare Fund are joint wrongdoers in the delictual action by the various plaintiffs against the defendant.

[26] The proposed seventh third party is Old Mutual. It is contended that it is vicariously liable for the conduct of an actuary employed by it who it is alleged knew or ought to have known that the transfers of the first plaintiff's assets were unlawful and would cause the first plaintiff to suffer the damages set out in the particulars of claim. It is contended that the actuary "participated in the transfer of the first plaintiff's assets as alleged in the particulars of claim". The problem with this allegation is that it is not alleged in the particulars of claim that anyone other than the defendant was responsible for the issue of the section 14 certificate. The fact that the actuary might have conducted a valuation of the funds or that he was aware or ought to have been aware of the purpose of the transfer of such funds to the Lifecare Fund does not in my view make the actuary a joint wrongdoer or Old Mutual vicariously liable for his conduct. There is no allegation in the draft annex to the third party notice that the actuary participated in any way in the application for or the obtaining of the section 14 certificate.

[27] The claim against third parties 1 to 5 and 8 are based on similar contentions as those against third parties 1 to 7 but as recipients of the second plaintiff's assets rather than the first plaintiff's assets. For the reasons set out above they do not in my view constitute a proper basis for holding that

they are joint wrongdoers in relation to the claim by the second plaintiff against the defendant.

[28] The claims against the third parties 1 to 5 and 9 to 14 are based on similar grounds but as recipients of the third plaintiff's assets. The contention that they are joint wrongdoers must be rejected for the same reasons as set out above.

[29] The claim against third parties 1 to 5 and 15 to 21 are based on similar allegations but as recipients of the fourth, fifth and sixth plaintiffs' assets. The contention that they are joint wrongdoers must be rejected for the same reasons as set out above.

[30] The claim against the 1st to 5th and 20th to 24th third parties are again based on similar allegations but as recipients of the seventh plaintiff's assets. The allegations must be rejected for the same reasons.

[31] In coming to the conclusion above I have had regard to the distinction to be drawn between a joint wrongdoer and a concurrent wrongdoer. As stated in the *Nedcor Bank* case[7] joint wrongdoers are persons who acting in concert or in furtherance of a common design jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers on the other hand are persons whose independent or several delictual acts are combined to produce the same damage. Providing the requirement of causality can be satisfied

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[7] *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 910 (SCA) at para [10] page 922.

concurrent wrongdoers are liable for the full amount of a plaintiff's loss. The third party notices purport to join each of the proposed third parties as joint wrongdoers. On the facts as they appear from the papers before me none of the proposed third parties are in fact joint wrongdoers as none of them jointly committed the delict which caused the loss to the various plaintiffs i.e. they did not apply for or obtain the section 14 certificate.

[32] Mr Van Eeden SC for the applicant submitted that it was common cause that the applicant had not itself received any of the funds transferred from the various plaintiffs to the Lifecare Fund and that the issue of the third party certificates would enable the applicant to recover the funds from the actual recipients of the funds. Mr Gauntlett SC for the respondents submitted that what he referred to as the applicant's "dispersal theory" was flawed because the delict that caused the loss to each of the plaintiffs was the obtaining of the section 14 certificate for which the applicant was solely responsible. What happened to the funds after such funds vested in the Lifecare Fund pursuant to the provisions of section 14(2) of the Pension Funds Act is irrelevant to the cause of action. It might be that the applicant has a right to recover the funds from the actual recipients of such funds (an issue on which I do not express an opinion). It is clear however in my view that this right is not based on nor can it be based on the delict pursuant to which the respondents are suing the applicant. If there is a right of recovery it will have to be based on a different cause of action.

[33] Mr Van Eeden SC submitted that the very fact that the respondents have been able to recover funds from various of the third parties pursuant to settlement agreements concluded with them is supportive of the contention that such third parties are joint wrongdoers because he submitted that the amounts recovered were all deducted from the damages claimed from the applicant. Whilst it is obvious that any amount recovered has to be deducted from the damages claimed as such recovery will clearly reduce the damages it does not follow that the recoveries made were from joint wrongdoers or based on the same cause of action as that of the respondents against the applicant.

[34] In my view I am also required to weigh up the prejudice likely to be suffered by the respondents if the application is granted against the prejudice likely to be suffered by the applicant if it is not. In my view the likely prejudice to be suffered by the respondents is greater than that likely to be suffered by the applicant. If 24 third parties are joined to these proceedings it is clear that the trial which has been set down for April 2010 will not be able to proceed. In addition apart from the actual litigation becoming unwieldy the length of the trial will be greatly increased at substantial additional costs for all parties involved. As against this it must be borne in mind that all that can be obtained by the defendant against the third parties is a declarator as to such third parties' liability if any. Whatever happens in this trial the defendant will be required to sue the third parties to enable it to recover the amount that it contends it is entitled to recover from each of them. The defendant has issued notices in terms of section 2 of the AOD Act against 20 of the 24 third

parties. It will be entitled pursuant to such notices to sue the third parties and recover from them whatever it would have been able to recover pursuant to the third party notice. The four third parties on whom the applicant has not served section 2 notices can be sued with the leave of the court in terms of section 2(4)(a) of the AOD Act. Consequently in my view the prejudice that the applicant would suffer if the application is not granted is very limited.

[35] Although the respondents gave notice in the answering affidavits in the various applications and in the heads of argument that were filed on their behalf that costs would be sought on a punitive scale Mr Gauntlett SC did not press for such an order in argument. There are no grounds to justify a punitive costs order in the Rule 21 and the Rule 13 applications. The Rule 35 application is however on a different footing. It is in my view so misconceived that it amounts to a vexatious proceeding within the meaning ascribed thereto in In Re Alluvial Creek 1929 CPD 532 at 535

[36] In the circumstances I order that all three applications are dismissed with costs. The costs in the Rule 35 application are to be paid on the attorney and client scale. All such costs are to include the costs of two counsel.

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J F ROOS
ACTING JUDGE OF THE HIGH COURT

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