IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: **2010/728**

JOHANNESBURG, **15 May 2011**

REPORTABLE

BEFORE THE HONOURABLE **JUDGE SPILG**

In the matter between:

IOZZO, ANTONIO N.O. First Applicant
(In his capacity as trustee of the **M SHARE TRUST***)*

IOZZO, NICOLA N.O. Second Applicant
(In her capacity as trustee of the **M SHARE TRUST***)*

HUTCHINSON, GREGORY CLYDE N.O. Third Applicant
(In his capacity as trustee of the **M SHARE TRUST***)*

and

ROCHA, MARIO ALEXANDRE First Respondent
DE FIGUEIRDO N.O.
(In his capacity as trustee of the
M R HOLDINGS AND INVESTMENT TRUST*)*

DU PREEZ, TANYA N.O. Second Respondent
(In his capacity as trustee of the
M R HOLDINGS AND INVESTMENT TRUST*)*

AND;

In the counter application of:

ROCHA, MARIO ALEXANDRE First Applicant in
DE FIGUEIRDO N.O. Counter Application
(In his capacity as trustee of the
M R HOLDINGS AND INVESTMENT TRUST*)*

DU PREEZ, TANYA N.O. Second Applicant in
(In his capacity as trustee of the Counter Application
M R HOLDINGS AND INVESTMENT TRUST*)*

And
IOZZO, ANTONIO N.O. First Respondent
(In his capacity as trustee of the **M SHARE TRUST***)* in Counter Application

And Others

JUDGMENT

SPILG, J:

NATURE OF APPLICATION AND COUNTER-APPLICATION/ INTRODUCTION

1. This case came by way of a special allocation. It consists of a main application and a counter-application running into over 1200 pages. The three applicants in the main application sue in their representative capacities as trustees of M ShareTrust. The trust is a registered inter *vivos* business trust. The trustees are Antonio Iozzo, Nicola Iozzo and Gregory Clyde Hutchinson.

2. The Applicants sue the two trustees of the M R Holdings and Investment Trust (the "*MRHI Trust"*), namely Mario Rocha and Tanya du Preez. Prior to the agreement which forms the subject matter of the dispute the Respondents held 40% of the shares in Mont Blanc Projects and Properties (Pty) Ltd (*Mont Blanc*) and the Applicants held the balance.

3. On 28 October 2008 the parties concluded a written agreement . Antonio and Nicola Iozzo represented the Applicants and Mario Rocha (*"Rocha"*) represented the Respondents. The agreement related to the sale by the Applicants to the Respondents of its entire 60% shareholding in Mont Blanc for a consideration of R2.2m and also its loan account claims of R4.8m; ie a total of R7 million plus interest.

4. In terms of the agreement;

    a. The MRI Trust was to pay by way of electronic funds transfer;
        i) R4 million within 48 hrs of signature;

ii) R3 million by 15 December 2009.

b. If payment of the balance was not made by 15 December 2009, interest would be calculated at the prime overdraft rate published and charged by the Company's bankers , and in the event of dispute a certificate from the manager or assistant manager would suffice;

c. There were three suspensive conditions;

i) Rocha was to sign a suretyship binding himself as surety and co-principle debtor for the MRI Trusts obligations;
ii) The Applicants and Meadow Star Investments 85 (Pty) Ltd were to conclude a settlement agreement in order to cancel the building and development contract between them;
iii) The Respondents were to procure a resolution from Mont Blanc in terms of which it ratified the sale concluded on 23 September 2008 to Grant of erf 2258 Douglasdale.

d. On the effective date (being the date of signature to the agreement) and against payment of the deposit, share transfer forms in negotiable form were to be delivered to the Respondents;

e. in the event of default the innocent party was entitled to either cancel the agreement or claim specific performance after affording the other party ten days written notice to remedy its breach. This was without prejudice to any other rights, including any entitlement to claim damages.

5. The agreement contained a confidentiality clause precluding disclosure of its contents save as required by a court (cl 14)

6. It was also a term of the agreement that payment of the purchase price was to be "*free of exchange deduction or set-off".* (cl 4.2.3)
7. There were also non-variation and non-waiver clauses (cl 9 and cl 10). Although there was not a sole memorial clause it is evident from the contents of the agreement and the surrounding facts presented by the Respondents in their papers that the parties contemplated that it was to be the sole memorial of their agreement. See *Goldblatt v Freemantle* 1920 AD 123 at 128 to 129.

8. It became common cause that;

    a. the suspensive conditions were fulfilled or deemed to have been fulfilled;
    b. proper demand was made for payment;
    c. the interest payable as from 15 December 2009 is calculated at 10.5%.

9. The Respondents paid the first amount of R4 million but refused to pay the second and final amount on the ground that Iozzo and others had breached the settlement agreement by acting in a manner injurious to their interests.

10. Three days after the final payment fell due, and on Friday 18 December 2009, Rocha , du Preez and the Respondents (ie the trustees of the MRHI Trust in their capacities as such) instituted action proceedings against *inter alia* the Applicants claiming *contractual* damages totalling in excess of R8 million for a defamatory publication arising from what they contended was a breach of a tacit term of the settlement agreement, or alternatively *delictual* damages for defamation. The Plaintiffs in the action rely on various cessions of these claims from Mont Blanc to them. In the case of the Respondents

the cession was for some R4.74 million jointly with the other Plaintiffs while Rocha claimed a separate cession for the balance.

11. In response, on 8 January 2010 the Applicants brought the present application for payment of the final amount of R3 million together with interest and costs.

12. Subsequently in March 2010 the Applicants brought an interlocutory application in order to rectify various matters in its application and to place the M Share Trust deed on record.

13. The Respondents then brought a counter-application in September 2010. The counterclaim repeated the claim for damages contained in its earlier summons and for the first time the Respondents added a further claim for a reduction of the purchase price for the shares and loan account by just under R2.95 million. Subsequently , under a new action instituted only on 28 February 2011 this further claim was pursued. The claim is based on an alleged fraudulent misrepresentation as to the value of the loan account, which it is alleged was overstated by some R1.948 million , and an actionable non-disclosure of the true value of the shareholdings resulting in the consideration for the shares being overstated by R1 145 150. According to the Respondents the net result is that the Respondents have already overpaid an amount of R93 478.65 for the shares and loan account and are entitled to claim this amount back.

ISSUES FOR DETERMINATION

14. There are over fifteen issues raised by the parties. They include matters such as;

    a. Is M Share Trust properly before the Court? In particular does the M Share Trust have *locus standi* to launch the main application, oppose the counter-application, sell and transfer

ownership of 60% shareholding in Mont Blanc and claim payment of R3 million?

b. Furthermore are the decisions made by the trustees of M Share Trust valid and did the trustees' decisions comply with the Trust Deeds requirements?

c. Was the purchase price based on the actual value at the time of the shares and loan account and if not were there actionable misrepresentations and non-disclosures entitling the Respondents to a reduction of the purchase price to an extent that would wipe out the Applicants claim for the remaining R3 million?

d. Did either of the Iozzo brothers defame Mont Blanc and if so does this give rise to either a contractual or delictual claim in favour of the Respondents against the Applicants both in their representative capacities as trustees of their respective trusts (being the parties to the share sale agreement) and not personally in each cases;

e. If there was such a breach did Mont Blanc suffer loss and what is the nature of its loss?

f. Can there be a valid cession to the Respondents in respect of the claims

    i) Under the *actio iniuriarum*?

    ii) Under the *actio legis aquilia*?

    iii) For contractual damages?

g. Was there an impermissible splitting of claims thereby precluding the cession ?

h. Can set-off apply ?

i. Is there a factual dispute to be referred to evidence or to trial?

j. Does the lis between the parties in the action and the lis between the parties in the motion proceedings require that both cases be heard together?

k. What is the effect of the alleged fraudulent back dating of documents and share certificates by the Applicants?

l. Did the M Share Trust actually acquire its alleged 60% shareholding in Mont Blanc at all and if so then it could only have been after September 2004, despite documents reflecting this earlier? However this was not pursued further when the consequence of the Respondents being correct was pointed out during argument, namely that the agreement would be void and the parties would have to be restored to the *status quo ante.* In any event no such relief had been sought.

15. In my view, if the following issues are answered in favour of the Applicant then it is unnecessary to deal with any of the other issues raised;
    a. Do the Applicants have *locus standi* ?
    b. How was the purchase price to be determined and were there misrepresentations and non-disclosures about such determination which resulted in the Respondents paying an inflated amount for their shares?
    c. Can the Respondents raise a contractual claim for breach of contract by reason of the alleged defamation and if so has a case been made out on the papers that entitles the Respondents to defeat the Applicants' claim or to obtain a stay pending the resolution of their counterclaim by way of oral evidence or the final determination of both of the Respondents' trial actions ?
    d. Is a defamation claim available against the Applicant based on pure economic loss?

RULING OF 22 OCTOBER 2010

16. The Respondents informed this court that they would be appealing the order of Reyneke AJ given on 22 October 2010 , which was in the following terms;
    a. Postponing the application sine die
    b. Respondents are to pay the costs on the attorney and client scale

c. Fourth Respondent in the counter-application are to file a Replying Affidavit by 27 October 2010
d. Heads of argument are to be filed by 3 November 2010.

Even if the appeal is not of a purely interlocutory order the decision does not affect the proceedings before me and does not influence my own deliberations.

APPLICANTS' *LOCUS STANDI*

17. The Respondents contend that the M Share Trust is not properly before the court because all business decisions had to be by unanimous approval taken by M Share Trust's "*executive board of trustees*" which included a certain Naim-Mason. It is common cause that Naim-Mason did not participate in any of these decisions.

18. The answer is straight forward. The facts reveal that the beneficiaries of the M Share Trust had changed and so too the entitlement to remain as a trustee or nominate a person to the executive board of trustees. It is to be borne in mind that the trust was established as a business trust with the beneficiaries themselves being trusts which nominated the trustees. The supplementary replying affidavit confirms that letters of authority were issued on 10 October 2009 to only the three applicants.

19. I am satisfied that the point has no merit.

MISREPRESENTATIONS AND NON-DISCLOSURES INDUCING INFLATED PURCHASE PRICE

20. In this regard the Respondents contend that the purchase price was to reflect the actual value of the shares and loan account at the time of sale. They claim that having regard to the correctly revised financials of Mont Blanc the purchase price for a 60% shareholding in Mont Blanc

and the Applicants loan account was R4.8 million but due to fraudulent misrepresentations regarding the loan account amount and actionable non-disclosures in respect of the value of the shares the Respondents were induced to believe that the proper purchase price was R7 million.

21. There is nothing in the settlement agreement to suggest that the purchase price was to be based on the actual value at the time of the shares, nor anything other than the agreed amount identified for the loan account. There was also a significant time lag between the conclusion of the agreement and the handing over of risk and effective control of the entire business on the one hand and the due date of the significant final lump sum payment which one would ordinarily expect to increase the consideration by some interest factor.

22. It is apparent that at the time Rocha would have had a fair knowledge of the value of the shares and the loan account claims . After all he was in effective control of the day to day management and was the person who had the expertise as a developer, not the Iozzo's, on behalf of Mont Blanc.

23. Moreover the claim that Rocha was excluded from accessing the books for a few days takes the matter no further. By his own accounts he was hands on and would have had a very good idea of what he was prepared to pay for the uncompleted developments that formed the stock in trade of Mont Blanc through its various SPVs. Moreover he was in contact with his attorneys who were involved in counselling him during the negotiations.

24. The agreement, on the Respondents' own version, was concluded in order to end the relationship between the Applicants and the Respondents which had become acrimonious. In the truest sense of the word the agreement was a negotiated settlement to resolve all the issues between them. In such a case the purchase price is more likely to be based on a walk away figure for both parties. In the case of the

Respondents it is to be expected that they would have regard to what they believed the value of the business would be to them. This is borne out by the actual financial data which reflects that the figure relied upon by the Respondents as the correct value for the shares bares no relationship to even the values placed at the time in their own hand. On the contrary the overall purchase consideration appears eminently reasonable and a far cry from the figures contended for by the Respondents.

IMPLIED OR TACIT TERM

25. The Respondents contend that it was an implied or tacit term of the agreement that not one of the trustees of the M Share Trust " *may take any step or any action, of whatsoever nature, with the aim of prejudicing the commercial interests of the Mont Blanc Group or any person or entity forming part of the Group"*

26. The Respondents' particulars of claim also sought to rely on a duty of care owed by the individual trustees as directors of a company known as Mont Blanc which was effectively the holding company in which the Applicants and Respondents respectively held a 60% and 40% shareholding. In turn this company was the sole shareholder of a number of special purpose vehicles, each concerned with a separate development project. The Respondents quite correctly did not pursue this during argument, if only because, on any basis, post-agreement there is no such duty of care owed by the Applicants to the Respondents.

27. The Applicants contend that no such term can be imported into the agreement and that in any event the agreement was intended to be a final settlement of disputes between them and therefore comprised the sole memorial of the terms agreed upon.

28. Mr Louw SC also submitted in his comprehensive heads of argument that the term sought to be introduced was an implied term on the basis that if anyone were to ask an officious bystander whether the Iozzo brothers had a duty not to interfere with the business interests of Mont Blanc until at least the balance of the purchase price had been paid then the answer would have been in the negative.

29. Firstly, the term sought to be imputed is too broad. It is clear that the Applicants could undertake their own developments which might compete with Mont Blanc for occupants. There was no restriction on competition. Accordingly the term contended for contradicts the basis of the settlement between the parties as evidenced in their agreement.

30. However Mr Louw did not confine his argument to a tacit term. He also argued that a term can be implied by law that the seller was not permitted to destroy the goodwill of the business sold. He relied on *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A) at 419 ff being the separate concurring judgment of van Heerden JA which placed emphasis on the *naturalia* of an agreement where goodwill formed part of the business assets acquired under a sale agreement and distinguished it from the entirely separate provisions concerned with a limited five year restraint of trade covenant .The majority decision had regard to the intention of the parties that could be implied into the contract.

31. In *Becker* the sellers of a business had strictly complied with the restraint covenant for its entire duration of five years after which they sought to solicit business from their old customers. The court had to determine whether the parties intended the sale of the goodwill to be tied up with the wording of the restraint. Accordingly the focus was on the goodwill component of a business comprising its customer base.

32. In the present case it is clear that the purchase price for the shares related to the return that the Respondents believed could be achieved

once development was completed by the Mont Blanc SPVs . In order to achieve this objective Mont Blanc required it's funding to remain in place. It may be argued whether the benefits of a funding arrangement with one's banker constitutes goodwill. I subscribe to the view that it does by reference to an application of the considerations referred to in *SIR v Cadac Engineering Works (Pty) Ltd* 1965 (2) SA 511 (A) and the case of *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 at 235 which it applied. Even if it cannot be so classified, the benefit of the banker customer relationship and the continuation of the facility have the same attributes as, or are is sufficiently analogous to, goodwill as to be treated in the same manner.

33. During the course of the judgments of both Muller JA and van Heerden AJA (at the time) reference was made to the case of *Bergum v Weber* 288 P 2d 623 (also cited as 136 Cal.App.2d 389) and *Trego v Hunt* 1896 AC 7, Lord MacNaghten at pp22-25.(See *Becker* at 414H to 415 G; 419D to 422C and especially the reference at pp 420H to 421F). In all the cases mentioned it was held that a seller who disposes of the goodwill of his business cannot subsequently act contrary to the sale and in *Bergum* the underlying rationale is clearly stated: *" The law implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain "* at p392 of the Cal.App 2d report.

34. In my respectful view this is properly to be construed in our law as a necessary incidence , or *naturalia* , of an agreement of this nature. In the context of the sale of a business as a going concern (whether by way of the acquisition of its assets or of its shares) it includes everything that can be properly said would, *objectively* speaking*,* have been taken into account and affected (with the possible qualifier of materially) the determination of the consideration payable (compare Cloete JA's minority concurring judgment in *Commissioner for South African Revenue Service v SA Silicone Products (Pty) Ltd* [2004] 2 All SA 1 (SCA) at para [27]. In the present case the preservation of the

banker customer relationship with specific reference to the continuation of the facility in its existing form would have been one of the factors determining the price that the Respondents were willing to pay and the Applicants would have appreciated this.

35. I therefore find that it was a *naturalia* or an implied term (ie a term implied by law rather than a tacit term implied by the facts- see *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974(3) SA 506 (A) at 531 to 532) that the sellers would not do anything to deprive the purchasers of the fruits of their bargain. In the present case refraining from competing in the same industry was not one of them, but attempting to call up or materially alter the terms of Mont Blanc's banking facilities would be.

DID THE APPLICANTS BREACH THE IMPLIED TERM AND IF SO DID THE RESPONDENTS SUFFER CONTRACTUAL DAMAGES

36. The question that needs to be considered is whether the Respondents' can defeat a claim for payment of the balance of an agreed purchase price due and payable on 15 December 2009 for the sale to it by the Applicants' of the remaining 60% shareholding in Mont Blanc by raising a defence based on a defamation which is alleged to have destroyed or substantially impaired the goodwill of Mont Blanc.

37. This requires a consideration of whether there is enough in the counter-application to indicate at least prima facie (in order to allow the court to consider exercising its discretion to stay judgment on the application pending the outcome of the first trial action instituted) that the Applicants informed a certain Deon Pienaar that there was a fraud relating to Mont Blanc's facilities with RMB knowing that , or negligent as to whether or not, he would convey this to RMB with the result that credit facilities would be either withdrawn from the Mont Blanc group, or restructured in a severely prejudicial manner resulting in loss which

either the Respondents or, at the least Mont Blanc, is entitled to recover against the Applicants.

38. It is common cause that the Mont Blanc Group had obtained a credit facility from Rand Merchant Bank Ltd (*"RMB")* of R70 million in order to develop a project known as the *"Illovo Edge Development".*

39. It is evident from a reading of the papers that the Mont Blanc Group was dependant on the facility to complete the development , from which it would earn substantial income and hence profits.

40. The Respondents contend that Antonio and Nicola Iozzo conspired to publish untrue statements about the Mont Blanc group to RMB in order to induce it to withdraw the credit facilities or to call for better security . It is also alleged that in order to achieve their objective the Iozzo brothers, on an unknown date forwarded a letter to a Mr Pienaar, who because of his fiduciary relationship with RMB was obliged to disclose its contents to them.

41. The contents of the letter alleged that the Mont Blanc Group had been guilty of numerous fraudulent misrepresentations and had also fraudulently failed to disclose certain material facts to RMB. These allegations ranged from significantly over-valuing the security it had approved to RMB and selling units held as security by the bank without its knowledge to active collusion by bank employees and the creation of fictitious lease agreements in order to lead RMB to believe that there was an adequate rental income stream to service the interest repayments. In addition allegations were made that Mont Blanc was trading recklessly, could not pay its creditors and that its members were guilty of fraud and could not be trusted.

42. The Respondents contend that as a consequence of this letter RMB required the Mont Blanc Group to increase its equity contribution by R21 million. In order to do so the Group incurred substantial extra

costs and suffered significant loss of profits which totalled almost R9 million made up of five claims , one in respect of additional finance costs of R464 920, and the others concerned alleged resultant project delay losses of R1.7 million, penalty costs incurred of R849 600, losses incurred in the forced sale of another property of some R1.724 million and loss of profits of some R4.1 million. These amounts were then alleged to have been ceded by the Mont Blanc Group (effectively Mont Blanc itself) to the Respondents in respect of the first four claims totalling some R4.74 million and the last claim of some R4.1 million was ceded to Mario Rocha personally.

43. Furthermore the Respondents contend that the Iozzo brothers acted in the course and scope of their offices as trustees of the Applicants with the result that it is the Applicant Trust (so to speak) that is vicariously liable for their conduct.

44. In considering this issue I bear in mind that the Respondents do not have to demonstrate their position as correct on the ordinary motion court test of evidence to support final relief (*Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984(3) SA 624 (A) at 634H to 635C), nor even on a balance of probabilities at this stage having regard to the relief they are seeking. However the Respondents' allegations are hearsay and the only person who can deal with the receipting of the letter and whether and when he informed RMB is Mr Pienaar. There is no affidavit from him or an explanation as to why it has not been forthcoming. It remains the Respondents' duty to explain why a material witness has not deposed to an affidavit and: *"Most importantly , and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established", per* Cloete JA in *Minister of Land Affairs v D & F Wevell Trust and others* 2008(2) SA 184 (SCA) at 205B.

45. However, even if that obstacle can be traversed the objective facts do not support the Respondents' allegations. I am satisfied having regard to the approximate date when the offending letter came into existence and other documentation produced that the actual restructuring of funding had nothing to do with the alleged letter, but was due to the way the Respondents were conducting the affairs of the Mont Blanc group. This makes it unnecessary to consider any of the other difficulties the Respondents would have had to overcome, particularly that of seeking to attach vicarious liability to the Applicants and if possible whether a liquidated claim should be stayed pending the outcome of an illiquid counterclaim, albeit arising from the same agreement.

THE CLAIM BASED ON DEFAMATION

46. It would have been to the Respondents advantage to formulate a claim or defence based on a breach of the very contract upon which the Applicant bases its claim for payment of the balance of the purchase price. I have already rejected the Respondents' contentions that they are entitled to a reduction of the purchase price and entitled to damages for the contractual breach of an implied term arising from the alleged defamatory publication.

47. The question then is whether a delictual claim based on the contents of the letter being defamatory of the Respondents can assist it to stay judgement or execution of the applicants' claim.

48. In my view while the document is clearly defamatory and any damages suffered would be in the form of pure economic loss, the Respondents are, for reasons already given again unable to demonstrate, even *prima facie,* a causal link between the defamation and the alleged losses sustained. On the contrary the papers before me do not demonstrate that the contents of the letter affected Mont Blanc. Again

this is revealed by the chronology of events readily discernable from the documents and correspondence produced.

49. The stay of judgment or of execution of a judgement on a liquid or liquidated claim pending the resolution of an illiquid claim or counter-claim brought by the other party involves the exercise of a judicial discretion. In my view there is nothing in the Respondents papers to set up factual grounds to support the claims made. On the contrary the Respondents have demonstrated that they are prepared to set up palpably untruthful defences, such as denying that all the suspensive conditions were fulfilled, claiming that they were duped and pressurised into paying more for the shares then they should have, when they were in de facto control of the management of the business. Moreover there has been no discernable adverse consequence to Mont Blanc. Indeed the Respondents claim that it has been most successful and the last thing they would wish is to cancel the sale and return the 60% shareholding to the Applicants.

50. The way in which the Respondents have conducted this case and the lack of substantive averments, as opposed to unsupported heresay evidence and what can best be described as speculation, leads me to conclude that there is no genuine case.

THE CESSIONS TO THE RESPONDENTS

51. The Applicants seriously challenged whether there were any genuine cessions and if so whether there could be a splitting of the claims .

52. The matter was postponed to afford the Respondents an opportunity to remedy the position with documentary evidence. At the resumed hearing the Respondents produced the set of company documents running into hundreds of pages to deal with this aspect.

53. In my view it is unnecessary to deal with this issue save in relation to the costs of the extra hearing that it necessitated.
54. The Respondents were aware that the regularity of the cessions was in issue and they failed to provide the necessary evidence timeously. This necessitated the adjournment which was vital to the Respondents. Without the indulgence the Respondents could not rely on any evidence of probative value. Although the Applicants raised cogent arguments as to demonstrate that the cessions to the Respondents were not competent, I will assume without deciding that the Respondents intended to create a situation that would enable them to pursue a claim against the Applicants. Again, without deciding the issue, it appears possible for the party to an agreement to claim directly for damages sustained as a breach of the implied term not to destroy the fruits of the bargain, by reference to prospective dividends or, in this case, the historic distribution of dividends as and when an SPV had passed on its profits through dividends or other means to the holding company.

55. This decision does not in any manner preclude the Respondents from pursuing at their peril either of their trial actions against the Applicants or the other defendants to the litigation. What it does is allow the Applicants to obtain a judgment now for their claim upon which they may execute.

ORDER

56. I consequently made the following order on 20 April 2011:

1. *The First and Second Respondents (in the main application) in their capacities as trustees of the MR Holdings and Investment Trust are to pay to the Applicants (in the main application) in their capacities as the trustees of the M Share Trust;*
    a. *The sum of R3 000 000.00 (Three Million Rand);*

b. *Interest thereon at the rate of 10.5% per annum as from 15 December 2009 to date of payment;*

c. *Costs of suit*

2. *The Respondents Counter Application is dismissed with costs.*

DATES OF HEARING: 1 to 4 March 2011 and, 23 March 2011

ORDER: 2O April 2011

REASONS FOR JUDGMENT: 15 May 2011 (Revised 16 May 2011)

LEGAL REPRESENTATIVES:

FOR APPLICANT: Adv E Wessels
David Lipshitz and Associates

FOR RESPONDENTS: Adv P Louw SC, Adv H Louw
J J Nel Attorney