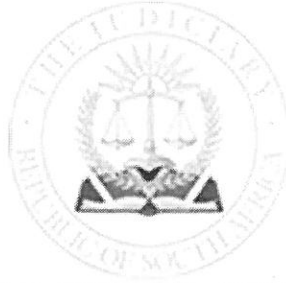



IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 16120/2016

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>05 MAY 2017</u> DATE	 SIGNATURE

In the matter between:

REGAL BELOIT CORPORATION
REGAL BELOIT SOUTH AFRICA (PTY) LTD
REGAL BELOIT AUSTRALIA (PTY) LTD

First Applicant
Second Applicant
Third Applicant

and

BRIAN GREGORY CAMPBELL
SHIRLEY CAMPBELL
CEM GROUP (PTY) LTD
(formerly CAMPBELL MOTOR GROUP (PTY) LTD)

First Respondent
Second Respondent
Third Respondent

JUDGMENT

NICHOLLS J:

[1] The applicants have brought, on an urgent basis, contempt of court proceedings against the respondents arising out of an order granted by Wright J on 7

June 2016. The order was granted pursuant to an urgent application, wherein the applicants claimed that the respondents had breached restraint of trade agreements, infringed the applicant's trade marks and unlawfully competed with the applicants. In this application, the applicants seek, inter alia the imprisonment of the first and second respondents for a period of 4 weeks.

[2] Notice for leave to appeal was filed on 5 September 2016, after the time period within which to apply for leave had lapsed. Nonetheless Wright J granted leave to the full bench of this division. This appeal was heard on 18 April 2017.

[3] The applicants are international companies. The first applicant is Regal Beloit Corporation, an international company based in the USA. The second applicant is the South African company, Regal Beloit South Africa (Pty) Ltd ('RBSA') and the third applicant is Regal Beloit Australia (Pty) Ltd. RBSA is a specialist supplier of electric motors and gearboxes, drives and related equipment sold under the CMG trade mark to sub-Saharan mining and industrial entities. The first and second respondents, Mr and Mrs Campbell, are former directors of RBSA, serving as such from 2003 until 2016. Mr Campbell was also the CEO of RBSA from 24 January 2003 until 26 February 2016. The third respondent is the Campbell Motor Group (Pty) Ltd, a company in which the first and second respondents have an interest.

[4] On 9 November 2016, Opperman J handed down a judgment in terms of section 18 of the Superior Courts Act, declaring the order of Wright J to be "*operational and enforceable and ... be executed in full*" pending the final determination of all present and future appeals. The applicants contend that notwithstanding the two court orders, Mr and Mrs Campbell have persistently and deliberately breached Wright J's order from the moment the order was handed down, thereby prejudicing not only the applicants, but also the administration of justice. It is this conduct which precipitated the present application for contempt of court.

[5] Two preliminary points were raised on the papers by the respective parties, but were not pursued with much enthusiasm in argument. The respondents challenged the urgency of the application, while the applicants sought to have the answering affidavit and supplementary answering affidavit disregarded on the grounds that they were filed late. It is accepted that a contempt application is by its very nature urgent. I am not convinced that this application was necessarily urgent for this week but in light of the present practice in this court where opposed matters can only be heard approximately two months after being enrolled, I am of the view that it is sufficiently urgent to warrant a hearing. As for the attempt to exclude the answering affidavits, it is in the interests of justice in most cases that the real issue is ventilated before court with all the relevant facts before it. In any event, the entire matter was argued as if the answering affidavit was before court.

[6] The first issue to dispose of is the question of authority, namely whether the applicants authorised this application; whether the applicants authorised the deponents to depose to affidavits on its behalf and whether the attorneys, Webber Wentzel, have been authorised to act on behalf of the applicants. This issue took on particular significance as it appeared to be the respondents' primary defence, with a sizeable portion of the respondents' argument and 37 pages of the answering affidavit devoted to this point.

[7] Authority, or more precisely lack thereof, was raised as a defence in the court a quo where it was disposed of in a single sentence: "*They [the respondents] raised various technical points of no substance.*" At the hearing of the appeal on 18 April 2017 the respondents belatedly attempted to amend their notice of appeal to include lack of authority. In an *ex tempore* interlocutory judgement, the court refused the amendment on the basis that it is settled law that the lack of authority must be specifically and unambiguously pleaded. The court went on to discuss the authority question at some length and concluded that the only remedy available to a party who wishes to challenge authority is to utilise Rule 7(1) of the Uniform Rules of Court.

[8] This is in line with *Eskom v Soweto City Council*¹ and *Ganes & Another v Telecom Namibia Ltd*². Both cases were cited with approval and confirmed by the Supreme Court of Appeal in *Unlawful Occupiers, School Site v City of Johannesburg*³. The respondents' counsel argued that these cases had been superseded by a later SCA case *Marvanic Development (Pty) Ltd & Another v Minister of Safety and Security and Another*⁴. The appeal in that matter turned on an interpretation of section 68(6) of the Road Traffic Act 93 of 1996 and whether it empowered the police to refuse to return certain vehicles that had been impounded for having falsified chassis and registration numbers. At paragraph 12 the deponent's lack of authority is mentioned as one of the "other reasons" why the appeal should fail. This is because he "does not allege, much less prove, the basis of his authority to depose to it [the founding affidavit] in respect of either of the appellants." It is difficult to understand on what possible interpretation this could mean that *Marvanic* in any way overturns or is in conflict with *Ganes* and the *Unlawful Occupiers, School Site*. There is no finding in *Marvanic* that leads one to conclude that Rule 7 is not the appropriate remedy to challenge authority. In fact, it appears that, in that case, authority was not even alleged.

[9] In this case the appeal court found that there had been no proper challenge to Webber Wentzel's authority and therefore that ground of appeal had little prospect of success. The application to amend the notice of appeal to include the question of authority was accordingly dismissed. The respondents served a Rule 7 notice on 20 April 2017, a few hours before filing their answering affidavit, apparently after having been alerted to the importance thereof at the appeal hearing. The applicants contend that having challenged Webber Wentzel's authority so late in the day, the respondents have waived their right to do so at this stage. Nonetheless, out of an abundance of caution they attached as an annexure to the replying affidavit, a notice in terms of Rule 7(4) providing the resolution and powers of attorneys authorising them to bring this application.

¹ 1992 (2) SA 703 (W)

² 2004 (3) SA 615 (SCA) at 624I – 625A

³ 2005 (4) SA 199 (SCA) para 14 & 16

⁴ 2007 (3) SA 159 (SCA); See also *Megacube Mining (Pty) Ltd v Keaton Mining (Pty) Ltd & Another* (19991/2016) Gauteng Local Division of the High Court (24 April 2017) at para 19 – 21

[10] The respondents, however, insist that the question of authority of the attorneys to act is different from authority of a deponent to act and to authorise the bringing of this application. There is no support for this proposition – the position has been repeatedly restated – the only available remedy to question authority is Rule 7. As was stated by Flemming DJP in *Eskom v Soweto City Council* (supra), where both the authority to depose to the affidavit and the authority to bring the application was challenged:

“ If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority... Courts should honour that approach.”⁵

[11] A further difficulty in respect of this argument is that, having been dismissed by the court a quo and disallowed in the appeal court, the issue of authority cannot be raised in these proceedings unless it is found that a contempt application is a separate and discreet application, totally divorced from the main application. This can hardly be the case, as a contempt application is nothing more than an attempt to enforce the execution of the order granted in the main action. To ascribe to it a status independent of the main application would, in my view, be erroneous. The issue relating to authority raised in this application, and the facts on which the argument is based, are no different from those in the main application. It was dealt with, albeit in a very cursory fashion, in the court a quo, and dismissed. It was dealt with by the appeal court and again dismissed. It is not open, nor appropriate, for this court to consider this point anew. In any event there is a tendency in our courts not to decide issues on technicalities but to deal with the substantive issues at hand. I can do no better than echo the words of Flemming DJP:

⁵ 1992 (2) SA 703 (WLD) at 705F - G

“I find the regularity of arguments about the authority of a deponent unnecessary and wasteful”.⁶

[12] The real issue in this application is whether the conduct of the respondents amounts to contempt of the order of Wright J which was granted on 7 June 2016. It is a wide and far-reaching order. It reads as follows:

- “1. Interdicting the first and/or second respondents from, directly or indirectly, contacting, soliciting or servicing any Active Customers (as defined in paragraph 66.1 of the affidavit of Hilton Fortmann annexed hereto (“the Founding Affidavit”)) for a period of 24 months commencing 10 May 2016, in respect of the first respondent, and commencing 10 March 2016, in respect of the second respondent (with 10 May 2016, in respect of the first respondent, and 10 March 2016, in respect of the second respondent, constituting “the Departure Date”) for the purpose of providing competitive products or services similar to those provided by the on behalf of the applicants between the Departure Date and 12 months preceding the Departure Date;
2. Interdicting the first and/or second respondents from directly or indirectly requesting or advising any Active Customers, or suppliers or vendors of the applicants who have, or have had, business relationships with the applicants between the Departure Date and 12 months preceding the Departure Date, for a period of 24 months following the Departure Date to withdraw, curtail or cancel any of their business or relations with the applicants;
3. Interdicting the first and/or second respondents from directly or indirectly soliciting the employment of any current employee of the applicants for a period of 24 months following the Departure Date;
4. Interdicting the first and/or second respondents, for a period of 24 months following the Departure Date, from disclosing or using, or causing to be disclosed or used, directly or indirectly, in any capacity, in any geographic area in which such use or disclosure could harm the applicants’ existing or potential

⁶ 1992 (2) SA 703 (WLD) at 705C

business interests, any Proprietary Information (as defined in paragraph 69.1 of the Founding Affidavit);

5. Interdicting the first and/or second respondents from using or disclosing the applicants' Trade Secrets (as defined in paragraph 69.2 of the Founding Affidavit) as long as they remain Trade Secrets;
6. Directing the first and/or second respondents to deliver to the applicants, promptly, and by no later than 5 days after the date of the order sought herein, all items which belong to the applicants or which by their nature are for the use of the applicants' employees only, including, without limitation, all written and other materials which are of a secret or confidential nature relating to the business of the applicants;
7. Interdicting the first and/or second respondents from holding him-/herself out or representing him-/herself as being employed by or connected with RBSA in any way whatsoever;
8. Interdicting the first and/or second respondents, for a period of 12 months from the Departure Date, from carrying on business, or being concerned in any business carried on, in the Restraint Area (as defined in paragraph 74.15 of the Founding Affidavit) which is competitive or likely to be competitive with any business carried on at any time during the 12 months preceding the Departure Date by RBSA and/or any of the Related Companies (as defined in paragraph 72 of the Founding Affidavit) of RBSA;
9. Interdicting the first and/or second respondents, for a period of 12 months from the Departure Date, from canvassing or soliciting business or custom for goods or services of a similar type to those provided by the RBSA and/or any of the Related Companies of RBSA from any person who is, at the Departure Date, or was at any time between the Departure Date and 12 months preceding the Departure Date, a customer of RBSA and/or any of the Related Companies of RBSA;
10. Interdicting the first and/or second respondents, for a period of 12 months from the Departure Date, from canvassing or soliciting the supply of goods or services of a similar type to those acquired by RBSA and/or any of the Related

Companies of RBSA from any person who is, at the Departure Date, a supplier to RBSA and/or any of the Related Companies of RBSA;

11. Interdicting the first and/or second respondents, for a period of 12 months from the Departure Date, from inducing or attempting to induce a supplier of RBSA and/or any of the Related Companies of RBSA to cease to supply, or restrict or vary the terms of supply to RBSA and/or any of the Related Companies of RBSA;
12. Interdicting the first and/or second respondents, for a period of 12 months from the Departure Date, from inducing or attempting to induce any employee, officer, agent or representative of RBSA and/or any of the Related Companies of RBSA to leave the employment of RBSA and/or any of the Related Companies of RBSA.
13. Directing the first and/or second respondents to protect the business and operations of RBSA for a period of 12 months from the Departure Date;
14. Interdicting the first and/or second respondents from doing anything which may disparage or damage the business, operations and goodwill of RBSA for a period of 12 months following the Departure Date;
15. Directing the first and/or second respondents to keep confidential, all Confidential Information (as defined in paragraph 74.7 of the Founding Affidavit) and to use his/her best endeavours to prevent the disclosure of Confidential Information to any person;
16. Interdicting the first and/or second respondents from using Confidential Information for a purpose other than for the benefit of RBSA;
17. Interdicting the first and/or second respondents from making a copy or other record of the Confidential Information or removing from RBSA's premises any information or copies of information;
18. Directing the first and/or second respondents to return to RBSA all papers, records and documents (including electronic documents, records and emails) in

his/her possession which relate in any way to the business of RBSA and/or any of the Related Companies;

19. Restraining the respondents, in terms of section 34(3)(a), read with section 34(1)(a) of the Trade Marks Act, 1993 ("the Act"), from infringing the third applicant's trade mark registration numbers 2005/17847 CMG and 2005/17849 CMG ("the CMG trade marks"), by using, in relation to any goods or services in respect of which the said trade marks are registered, the marks CMG, CMG ELECTRIC MOTORS and/or CMGMOTORS ("the offending marks") and any marks so nearly resembling the CMG trade marks as to be likely to deceive or cause confusion;
20. Restraining the respondents, in terms of section 34(3)(a), read with 34(1)(b) of the Act, from infringing the CMG trade marks, by using the marks CMG, CMG ELECTRIC MOTORS and/or CMGMOTORS and any marks similar to the CMG trade marks, in relation to any goods and services in respect of which the CMG trade marks have been registered that, in such use, there exists the likelihood of deception or confusion;
21. Directing the respondents, in terms of section 34(3)(b) of the Act, to remove the offending marks from all material including goods, electric motors, worm and geared gearboxes, drives and related equipment, containers, packaging, labels, advertising matter, websites, domain names and email addresses, and documents of whatever sort bearing, containing or referring to the offending marks, which may be in their possession or under their control and, where the offending marks are inseparable or incapable of being removed, an order directing that all such material be delivered up to the third applicant or its legal representatives;
22. Directing, in terms of section 34(4), read with sections 34(3)(c) and (d) of the Act, that an inquiry be held to determine the quantum of damages suffered by, alternatively the reasonable royalty due to, the third applicant as a result of the infringement of the CMG trade marks;
23. Directing that, in relation to the inquiry, in the event that the parties are unable to reach agreement as to any aspects of the procedure to be followed for the

holding of the said inquiry, each of the parties is authorised to make application to the above Honourable Court for directions in regards thereto;

24. Ordering the respondents, jointly and severally, the one paying the others to be absolved, to pay the applicants' costs of suit on a scale as between attorney and own client, including the costs of two counsel."

[13] It is convenient to categorise the order into four main parts. Paragraphs 1, 2, 9, 10, and 11 in broad terms prohibit the Campbells from directly or indirectly, contacting, canvassing or soliciting the applicants' customers or soliciting the supply of goods from their suppliers for a period of 24 months. Paragraphs 4, 5, 15, 16 and 17 deal with the use of propriety information and the disclosure of trade secrets and confidential information. Paragraphs 19, 20 and 21 prohibit the respondents from infringing the CMG trademark and requires them to remove all offending marks. Where this is impossible, they are obliged to deliver up the effected goods to the applicants. Finally, paragraphs 7, 8 and 14 prohibit the Campbells from carrying on business which is in competition with the applicants.

[14] Most of the information forming the basis of this application came to light via one Julian Oates ('Oates'), a former business partner of the Campbells who approached Hilton Fortmann ('Fortmann'), the CEO of RBSA and the deponent to the founding affidavit, after having fallen out with the Campbells. Oates incorporated his company, Gear Drives SA (Pty) Ltd ('GDSA'), in July 2016. GDSA is a direct competitor of RBSA in that it, inter alia, supplies and repairs industrial gearboxes and electrical motors. Soon after incorporation, Oates was put in touch with Mr Campbell through their mutual attorney.

[15] According to Oates, he agreed that Mr Campbell would invest R4.5 million in GDSA for which he would get a 60% shareholding in the company. Mr Campbell informed Oates from the outset that, because of the restraint of trade operating against him, he did not want his name on any of the documents or his involvement in GDSA to become publically known. In order to facilitate this deception, the son of Mr

and Mrs Campbell, Kyle Campbell ('Kyle'), is reflected on the draft shareholder's agreement of GDSA as having loaned the money to GDSA. Kyle, at the instance of his father, was employed as a sales representative at GDSA from September 2016 to February 2017. Mr Campbell also organised for GDSA to employ Mr Campbell's personal assistance at RBSA.

[16] From this, it is immediately apparent that there are a number of breaches of the Wright J order. The response to these allegations by Mr Campbell is that: *"I said to Oates that because of my recent experience with the second applicant, I did not want to become fully involved with GDSA as a named shareholder, lest the second applicant (or the first and/or third applicant) wished to make mischief for me."* No doubt the mischief foreshadowed was an application for contempt such as this.

[17] Mr Campbell went on to explain that he was satisfied that he was not breaching the order as his involvement was in the gearbox industry as opposed to the electric motor business, which was RBSA's primary focus. The targeted customers were different, as were the suppliers. According to Mr Campbell, the applicants in this application, as in the main application, focus on the importation, branding and selling of electric motors, whereas GDSA concentrates on gearboxes, as its name implies. Gearboxes, he states, only comprise 2,5 to 3% of RBSA's business.

[18] While the gearboxes may comprise a relatively small component of RBSA's business, the same cannot be said for the other applicants, as a cursory look at their website reveals. In any event, even if gearboxes were a small percentage of the business of RBSA this does not justify breaching the terms of the court order. It therefore seems that on his own version, there is evidence of the Campbells breaching the restraint order.

[19] The 'SEW' gearboxes that GDSA trades in are unique and cannot be substituted for RBSA's gearboxes, according to Mr Campbell. However, Oates

confirms that they have the same function as RBSA's gearboxes and are a small percentage of GDSA's stock. The bulk of GDSA's gearbox stock have the same specifications as those sold by RBSA, just under a different brand name. Mr Campbell makes specific mention of procuring Involute gearboxes to compete with the Fenner gearboxes. These are listed as one of the third applicant's products. Mr Campbell further admits intending to compete with Bonefigleoni gearboxes, another of the third applicant's products. Again there is, by Mr Campbell's own admission, a blatant breach of the order.

[20] It is alleged by the applicants that in January 2016, whilst still an employee and director of RBSA, Mr Campbell, on a business trip to China, ordered a shipment of motors from one of RBSA's Chinese suppliers for his own account. This came to light when an email regarding these motors was forwarded in error to RBSA. The shipment of over 700 motors was intercepted by RBSA, identical to the applicant's specifications and bearing the applicant's CMG trade mark. On 24 August 2016 Oates purchased motor stock to the value of R371 248.81 from Mr Campbell, all bearing the CMG trade mark. This is allegedly the same stock that was ordered by Mr Campbell during his China trip in January 2016, which he had been keeping at a warehouse in Durban. In August approximately 500 electric motors arrived at GDSA's premises.

[21] Mr Campbell responds to this by stating that electric motors purchased by Oates were purchased before the Wright J order. There were 286 in number and all the offending CMG trade marks were removed as per the order. Although they were at the premises of GDSA, Mr Campbell ordered them to be removed *"lest it was said that [he] was breaching the order of Wright J through the sale of motors."* What is evident is that Mr Campbell admits selling electric motors to GDSA, albeit a smaller number than alleged by the applicants, in breach of the order. Moreover, Oates denies that the CMG trade mark was removed.

[22] Mr Campbell denies that he targeted any of the applicants' customers and/or suppliers or used any of RBSA's confidential information. Fortmann alleges in his

founding papers that he was given RBSA's customer list by Kyle Campbell, who had received it from his father. Kyle also provided the 'call report and plan', which was a document containing the RBSA customers which Kyle had called or intended to call. This is denied by Mr Campbell, although he goes on to state that even if Kyle approached undisclosed RBSA customers, GDSA does not sell products that compete with RBSA and does not compete with them. In reply Fortmann referred to the customer list handed to him by Oates, being an excel spreadsheet setting out customer contacts. The author of the document is one Michelle Munsamy, a former employee of RBSA and personal assistance to Mr Campbell when he was CEO. Only the covering email was attached due to the fact that the customer list is confidential, and remained the proprietary information of RBSA. When the applicants attempted to hand up the file at the hearing, the respondents objected thereto. I accept, as deposed to by Fortmann and Oates, that the RBSA client list and the list handed to Oates are almost identical. In these circumstances there can be little doubt that the Campbells have been using RBSA's confidential information, in breach of the court order.

[23] I was referred to other breaches of the order but those described above are sufficient to conclude that there has been a breach of all categories of the court order.

[24] *Fakie NO v CCII Sytems (Pty) Ltd*⁷ sets out the pre-requisites for an order for contempt to succeed: (1) an order; (2) knowledge of the order; (3) non-compliance; and (4) wilfulness and mala fides. All must be proven beyond reasonable doubt but once the first three requisites are shown, both wilfulness and mala fides will be inferred and an evidentiary burden rests upon the respondents to establish reasonable doubt⁸.

⁷ 2006 (4) 326 (SCA)

⁸ *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C) at 49C-D and the authorities referred to; *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) para [18]

[25] It is common cause that an order was granted and that the respondents have knowledge thereof. In view of the conduct described above, non-compliance has also been proven. What remains is the question of wilfulness and mala fides. It cannot be merely a disregard of the order, but a breach that was deliberate and mala fide with the intention of violating the court's dignity and authority, as the respondents may believe themselves to be entitled to act in the manner they did, albeit mistakenly.⁹

[26] In this case it is inconceivable that the first and second respondents were not aware that their involvement in GDSA, a business which was in competition with the applicants, was in breach of the order. They nonetheless continued, heedless of the consequences. Both Mr and Mrs Campbell had tens of years of experience in the industry and cannot feign ignorance as to the meaning of the Wright J order irrespective of the view of Mr Campbell that it was "mind-boggling". That they felt compelled to hide their involvement in GDSA, using their son Kyle as a front, is further evidence of their mala fides.

[27] In the circumstances I am of the view that the applicants have succeeded in proving all the requisites of contempt beyond reasonable doubt. The respondents have failed to discharge the evidentiary burden placed on them to show lack of wilful disobedience, and accordingly in the absence of any compelling evidence to the contrary, the application must succeed.

[28] Insofar as costs are concerned the applicants seek costs on an attorney and own client scale. The respondents argue that if the applicants are successful then their alleged abuse of the urgent motion court proceedings is sufficient to justify them being deprived of their costs. It has been held that the concept of attorney own client costs has no meaning other than attorney-client costs and it is therefore

⁹ *Fakie* (supra) at para [9]

inappropriate to make such an award.¹⁰ There are no special considerations that lead one to the conclusion that either the applicants' or the respondents' conduct in these proceedings warrants a special costs order, apart from the standard order that the costs follow the result. In other words I am neither persuaded that a punitive costs order should be granted nor that the applicants should be deprived of their costs.

In the result I make the following order:

1. The respondents have breached the order granted by the Honourable Mr Justice Wright on 7 June 2016;
2. The respondents are directed, within 10 days of the order sought herein, to deliver up all electric motors in their possession or under their control to the applicants, who are to retain same in safekeeping until the restraint periods in the order have run their course;
3. The applicants are granted leave to remove the trade mark CMG and any confusingly similar mark from the electric motors delivered up in terms of prayer 2 and where these cannot be removed, the electric motors are declared delivered up to the applicants;
4. The respondents are declared to be in contempt of the order;
5. The first and second respondents are committed to prison for a period of two weeks, such imprisonment to be suspended on condition that the respondents comply with the terms of the order by Wright J and prayer 2 of this order;
6. The respondents are to pay the costs of this application on a party and party scale, such costs to include the costs of two counsel.



C. H. NICHOLLS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

¹⁰ *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W)

Appearances

Counsel for the applicants	:	Adv. J P McNally SC Adv. F Southwood
Instructing Attorneys	:	Webber Wentzel Attorneys
Counsel for the defendant	:	Adv. A Bishop
Instructing Attorneys	:	Gittins, Youngman & Associates
Date of hearing	:	25 April 2017
Date of judgment	:	05 May 2017