IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2018/40955

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

19/5/2022
DATE

JMoorcroft
SIGNATURE

In the matter between –

MAQUBELA, DUMA	**FIRST APPLICANT**
SINGAPHI, PATIWE	**SECOND APPLICANT**
AND	
THE MASTER OF THE GAUTENG LOCAL DIVISION, JOHANNESBURG	**FIRST RESPONDENT**
VAN HEERDEN, BAREND, *nomine officio*	**SECOND RESPONDENT**
MAQUBELA, THANDI SHERYL	**THIRD RESPONDENT**
MAQUBELA, ATHENKOSI	**FOURTH RESPONDENT**
MAQUBELA, NCANE SKHETHUCWAKA	**FIFTH RESPONDENT**

JUDGMENT

MOORCROFT AJ:

Summary

Community of property comes to an end when a marriage is terminated by death or divorce. The proceeds of life policies do not exist or fall into the joint estate of an insured married in community during his lifetime. The rights in respect of the death benefits arise after death and by that time there is no joint estate. The proceeds fall into his separate estate.

A person married in community of property does not become entitled to share in the proceeds of a life policy because of an insurable interest, and on the facts of the case no such insurable interest as relied upon by the third respondent can be identified.

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The rule in Hollington v F Hewthorn & Company Ltd [1943] KB 587 (CA) in terms of which a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which her or she was convicted was abolished in its country of origin 56 years ago, yet still forms part of the law of evidence in South Africa.

The Court is bound by section 42 of the Civil Proceedings Act, 25 of 1965 as interpreted in case law, to apply the rule but the desirability of retaining the rule deserves consideration.

Order

[1] In this matter I make the following order:

1. *The applicants' failure to launch the application within a period of thirty days from the date of the decision by the first respondent that form the subject of the application, is condoned;*
2. *The third respondent's application for a postponement is dismissed;*

3. *The third respondent's strike out application is dismissed with costs;*

4. *The decision of the first respondent dated 23 August 2018 and annexed to the founding affidavit in the application in which the first respondent refused to sustain the applicants' objection lodged in terms of section 37 of the Administration of Estates Act, 66 of 1965 is reviewed and set aside;*

5. *It is declared that he proceeds of Liberty Life Policy No. Policy 561 102 7785 00 shall be excluded from and does not form part of the assets of the joint estate of the Late Patrick Ntobeko Maqubela and Sheryl Thandi Maqubela, the third respondent;*

6. *It is directed that the proceeds of Liberty Life Policy No. Policy 561 102 7785 00 shall be distributed in terms of the Intestate Succession Act, 51 of 1987;*

7. *The application for an order that the third respondent be declared unworthy to inherit in terms of the Intestate Succession Act is dismissed;*

8. *No order is made as to costs in respect of the application for an order that the third respondent be declared unworthy to inherit;*

9. *The remaining costs of the application (including the costs of the application for postponement, the condonation application, and the costs of the strike out application) shall be paid by the third respondent on the scale as between attorney and client."*

[2] The reasons for the order follow below.

Introduction

[3] The applicants are children of the late Patrick Ntobeko Maqubela. They seek to have reviewed and set aside a decision by the Master of High Court, cited as the first respondent, made on 23 August 2018 in which the Master refused to sustain their objection lodged in terms of section 37 of the Administration of Estates Act, 66 of 1965, and an order declaring that the proceeds of a life policy shall not form part of the joint estate between their later father and his wife, the third respondent, as well as an order that the third respondent be declared unworthy of inheriting from the deceased estate of their late father. Their application was out of time and they seek condonation in this respect.

[4] The second respondent is the Executor of the deceased estate and the fourth and fifth respondents are daughters born of the marriage between the deceased and the third respondent.

[5] The third respondent is the only respondent opposing the relief sought.

[6] The third respondent brought an application for the striking out of certain paragraphs of the founding and the replying affidavits and also applied for the postponement of the matter.

[7] The application for a postponement was dealt with and disposed of first on 4 May 2022. The condonation application, the strike out application and the merits were then argued, and judgment was reserved.

Application for postponement

[8] On 20 April 2022 the third respondent's attorney's wrote to the Deputy Judge President in response to a notice of set-down served on 8 April 2022. The third respondent requested a postponement of the application on the basis that neither senior nor junior counsel briefed in the matter were available on the designated date, being 3 May 2022. On 21 April 2021 the Deputy Judge President responded in writing and *inter alia* informed the third respondent's attorneys that postponements should be dealt with on application.

[9] The third respondent then launched an application for postponement that was served on 3 May 2022, the day of the set – down and the day before the date allocated in the motion court.. The application was made on the basis that a new document, namely *"DM1 – Signed Liquid* (sic) *and Distribution Account dated 7 June 2009"* had been filed by the applicants on 29 April 2022.

[10] The document was however not new. An unsigned copy is to be found as annexure "DM1" to the founding affidavit. The applicants' attorneys thought it wise to file an otherwise

identical, but signed copy on 29 April 2022 but[1] filing the signed copy did not in any way prejudice the third respondent and no basis was suggested in argument as to why the signed version would require discussions *"at length"* with legal advisors or that the third respondent was caught by surprise and could not prepare properly on account of having access only to the unsigned copy annexed to the founding affidavit.[2] The document itself was never in dispute.

[11] There was no merit in the application for a postponement. The application for a postponement was dismissed and the condonation application, the merits and the striking out application were then argued.

Condonation application

[12] Section 35(10) of the Administration of Estates Act provides that a review application under the section must be brought within 30 days or within such longer period as the Court may allow.[3] The Master's decision was made on 23 August 2018 and the court application was launched on 2 November 2018, about 5 weeks out of time.

[13] The applicants' explain that they initially assumed that the decision of the Master was intended for the Executor. They then sought legal advice from a friend and requested the Master to furnish reasons. Towards the end of September 2018 they approached an attorney. A consultation was held with attorneys and counsel early in October 2018. There were

1 The two "DM1" documents can be seen on CaseLines, 001-36 and 080-4.
2 There was also an earlier copy dated 9 May 2015 that was made available in terms of Rule 35(12) of the Uniform Rules.
3 Condonation may be sought before or after the expiry of the period of thirty days. See *Reed v Master of the High Court of SA* [2005] 2 All SA 429 (E) paras 32 and 33.

documents to be obtained from the Executor and this was done by the end of October 2018. Counsel prepared papers and the application was launched early in November 2018. The applicants always actively pursued the matter and were not dilatory.

[14] The third respondent in opposing the condonation application states that she is prejudiced by the delay. This is a bald and unsubstantiated statement.

[15] The application for condonation must be evaluated against interest of justice principles. In my view the nature of the relief sought, the extent and the reason for the delay, its effect, and the reasonableness of the explanation for the delay, the importance of the issue raised, and the merits of the application require condonation to be granted,[4] and I so order.

Striking out application

[16] The third respondent brought an application that certain paragraphs[5] of the founding affidavit and of the replying affidavit[6] be struck out[7] on the grounds that they are scandalous and vexatious.

[17] The allegations sought to be struck relate to allegations that are central the applicants' case, and are relevant. The averments relate to the following aspects of the applicants' case:

17.1 The alleged forgery of the will and fraudulently presenting the will as the will of

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4 See *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) para 20 *et seq*.
5 Paras 14, 15, 17, part of 19, 44.1, 44.2, part of 46, 47 to 53, part of 55.3, part of 55.5, 55.7. 55.8, part of 55.11, 55.14, and 56.
6 Paras 9 to 11, part of 15.3, 37.1.1 and 37.1.2 (with introduction in 37.1), 37.3.5 to 37.3.9, part of 41.1, part of 41.2, part of 42, and 44.2.
7 See Rule 6(15) of the Uniform Rules.

the deceased, a crime that the third respondent was convicted of.

17.2 the allegation that she was in the deceased's apartment after his death, and an inference to be drawn that she knew about his death but concealed it.

17.3 The allegation that she had denied that the second applicant was a child of the deceased, an allegation made expressly by her attorneys.[8]

17.4 The alleged use of the deceased's cell phone when he was already dead.

[18] The remedy is a discretionary one[9] and the central question is the one of prejudice. I find that the allegations are neither scandalous nor vexatious in the context of the litigation, and that the third respondent was not prejudiced by the allegations made. I conclude that the striking out application stands to be dismissed.

The review application

[19] At the time of his death the deceased and the third respondent were married in community of property.

[20] He took out a policy on his life and initially determined that upon his death the proceeds should be distributed in terms of his will. He subsequently changed him mind and nominated his estate as beneficiary of the policy. He was versed in law; he was a practising attorney and

8 Annexure "DM8" to the founding affidavit (CaseLines 001-61).
9 *Stephens v De Wet* 1920 AD 279 at 282.

at the time of his death an acting Judge of the High Court.

[21] The Executor of the deceased estate drew the Liquidation and Distribution account on the basis that the proceeds of the policy fell into the deceased's estate and not the joint estate. In a certificate[10] annexed to the account the Executor recorded that the policy was excluded from the joint estate. It had no surrender value at the time of death and the death benefit only became payable after death. The Executor also referred to case law in support of his decision, including the *Danielz* case quoted below.

[22] The Master of the High Court upheld the third respondent's objection to the formulation of the account and directed the Executor to reflect the policy as an asset in the estate.[11]

[23] The Executor complied and produced an amended account reflecting the third respondent as being entitled to one-half of the proceeds of the policy by virtue of the marriage in community of property.[12]

[24] The present applicants lodged an objection[13] in terms of section 35(7) of the Administration of Estates Act in September 2016 and this objection was overruled[14] in August 2018.[15] The applicants requested reasons[16] for the decision and the Master responded[17] that

> *"the surviving spouse is not automatically excluded from inheriting from the estate her half share in terms of marriage in community of property unless there*

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10 Annexure "DM6" to the founding affidavit (CaseLines 001-58).
11 Annexure "DM7" (CaseLines 001-59).
12 Annexure "DM1" (CaseLines 001-36).
13 Annexure "DM2" (CaseLines 001-44).
14 Annexure "DM3" (CaseLines 001-47).
15 In terms of section 35(9) of the Administration of Estates Act.
16 Annexure "DM4" (CaseLines 001-48).
17 Annexure "DM5" (CaseLines 001-49).

is Declaratory order to that effect."

[25] The applicants were not satisfied with the decision and approached this Court for an order to set aside the decision of the Master in terms of section 35(10) of the Administration of Estates Act. The section reads as follows:

> *"35 (10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit."*

[26] The crisp question that arises is whether the proceeds of the life policy form part of the joint estate.

[27] Community of property comes to an end when a marriage is terminated.[18] The death of a spouse terminates a marriage in community of property and thus terminates the consequences of marriage.[19] In *Danielz NO v De Wet*[20], Traverso AJP confirmed that prior to death the proceeds of a life policy do not yet exist and do not form part of the joint estate:

> *"[41] Prior to the death of the deceased, the proceeds of the policies did not exist or fall into the joint estate. Until the death of the deceased, there was no certainty that a claim would be made at the time of his death. He could, for example, have surrendered the policies on the day before his death.*
>
> *[42] Upon his death the joint estate terminated. This occurs ex lege. (See Grimbeek v The Master 1926 CPD 183 at 185; Joseph v Joseph 1951 (3) SA 776 (N) at 779G – H; Hahlo Husband and Wife 5 ed at 174 – 6.)*

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18 *Hay v Hay* 1910 NPD 90 at 91; *Lubbe v O'Dwyer* 1942 WLD 137 at 137; Voet *Commentary on the Pandects* 23.2.90.
19 Heaton et al "Marriage" *The Law of South Africa* 2nd ed. 2006 para 85.
20 2009 (6) SA 42 (C) paras 41 to 43.

> *[43] It is only after the death of the deceased that the rights in respect of the death benefits arise. The joint estate will therefore not have a claim to an asset that arose after the joint estate had been terminated by the death of the deceased."*[21]

[28] In making the decision, the Master-

28.1 failed to distinguish between a surviving's spouse's entitlement to one-half of the joint estate and a right to inherit,

28.2 assumed that the proceeds of the policy formed part of the joint estate;

28.3 failed to have regard to the legal principles and the case law;

28.4 committed a material error of law; and

28.5 made a decision that was not rational.

[29] In conclusion, the proceeds of the policy never formed part of the joint estate and the third respondent never became entitled to one-half of the proceeds by virtue of the marriage in community of property.

[30] The third respondent contends that her claim under the life policy does not hinge on the proceeds of the policy falling in the joint estate. She argues that her marriage to the deceased established an insurable interest, and that *"absent an insurable interest no beneficiary of a life policy can validly lay claim to its proceeds."*

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[21] See also *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W) 948B and *Naidoo v Discovery Life Limited* [2018] ZASCA 88 paras 11 and 12.

[31] The case law relied upon by the third respondent in support of this submission relate to the concept of insurable interest of an insured person in property insured. In *Refrigerated Trucking (Pty) Ltd v Zive NO (Aegis Insurance Co Ltd, Third Party)*,[22] Hartzenberg J described insurable interest as follows:

> *"It seems then that in our law of indemnity insurance an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer an economic loss or, in respect of an event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the event does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens"*

[32] A person taking out short term insurance on property must have an insurable interest in the insured property. Insurable interest is evaluated from the perspective of the insured person and its interest in property. In the present matter a life policy was taken out by the deceased on his own life.

[33] It is simply not true, as the third respondent now argues, that *"absent the requirement of insurable interest in life assurance contracts, any stranger could lay claim to the proceeds of a life policy on the life of a total stranger."*

[34] The right to lay claim to the proceeds of a policy arises from nomination as a beneficiary or the law of succession.

[35] In conclusion, the Master's decision is irrational and must be set aside.

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[22] 1996 (2) SA 361 (T) 372F.

Unworthiness to inherit

[36] When a person dies intestate and is survived by one or more descendants and by a spouse, the spouse shall inherit a child's share but shall inherit at least a share in the value of an amount fixed from time to time by the Minister of Justice by notice in the Government Gazette.[23]

[37] The third respondent as the widow of the deceased who died intestate would accordingly be entitled to inherit a child's share or the prescribed minimum amount, unless she be declared unworthy of inheriting.

[38] Public policy requires that someone who has sought to defraud by forging a will should be regarded as unworthy of succeeding to the estate of the person whose will had been forged.[24]

[39] The third respondent was convicted of forgery and fraud arising out of the falsification of the deceased's purported will and for misrepresenting to the Master that the will was that of the deceased. She was also convicted of the murder of the deceased but that conviction was overturned by the Supreme Court of Appeal.

[40] The conviction for forgery and fraud was not appealed and the third respondent served a prison sentence. The conviction is common cause and the third respondent says that the

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[23] Section 1(1)(c)(i) of the Intestate Succession Act, 81 of 1987.

[24] *Taylor v Pim* 1903 NLR 484 at 492 to 494; *Yassen v Yassen* 1965 (1) SA 438 (N); *Casey NO v The Master* 1992 (4) SA 505 (N) at 510G; *Pillay v Nagan* 2001 (1) SA 410 (D); *Danielz NO v De Wet* 2009 (6) SA 42 (C) para 37.

decision not to appeal was a tactical decision taken on legal advice at the time.

[41] In support of the averment that the third respondent is unworthy, the applicants rely on the following evidence set out in the founding affidavit:

41.1 It is alleged that the third respondent lodged a purported will with the Master even though she knew that it was false, and that she had forged the deceased's signature or caused it to be forged.

41.2 The third respondent also objected to a distribution to the second applicant on the basis that the second applicant was not a child of the deceased, even though she knew her objection to be untrue.

41.3 The third respondent concealed the death of the deceased for two days before his body was discovered on 8 June 2009.

41.4 The evidence was that the deceased never left his apartment in Cape Town on 3 to 5 June 2009, and did not report for duty on the 5th.

41.5 When giving evidence in the criminal trial the third respondent testified that on 5 June 2009 she was in the apartment where the deceased's body was later found and the inference was that she knew he had died but concealed this fact.

41.6 On 5 June 2009 a telephone call was made from the deceased's cell phone to inform his secretary that he had been admitted to hospital. He was however never in hospital.

41.7 Between 5 and 9 June 2009 the deceased's cell phone was always in close

proximity to the third respondent's cell phone.

41.8 The third respondent took the deceased's cell phone with her to the Eastern Cape when he was already dead, and used it to send messages purportedly emanating from him.

41.9 When friends of his arrived at the apartment where he lived and wanted to enter the apartment, the third respondent advised telephonically that the deceased had been located so as to discourage the friends from entering the apartment where his dead body was.

[42] The first applicant gave this affidavit evidence on the basis that he was a witness in the criminal trial and observed the whole of the proceedings. He does not say which part of his evidence is based on personal knowledge of the facts, and which is based on what other witnesses[25] testified in court.

[43] The answering affidavit is not at all helpful. It suffers from the shortcoming that none of the averments made by the deponent to the founding are pertinently addressed.. The applicants' averments are met by a bald denial and a striking out application.

[44] The crucial evidence is the submission of the allegedly forged will to the Master. It is common cause that the Master rejected this will and that it was submitted to the Master by the agents of the third respondent.[26] The third respondent admits that the deceased died intestate[27] but denies that the signature of the deceased was a forged signature, and denies

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25 This would be hearsay evidence.

26 Paras 46 and 47 of the founding affidavit (CaseLines 001-21) and paras 71 to 74 of the answering affidavit (CaseLines 009-16 and 009-17).

27 In para 80 of the answering affidavit the concession is made that the estate of the third respondent's late husband *"stands to be dealt with"* as an intestate estate.

that she committed a fraud or forgery.

[45] In the criminal trial the presiding Judge indeed found that the will was a forgery and convicted the third respondent of fraud. The criminal standard of proof beyond reasonable doubt was satisfied. The question that arises is whether this court can take cognisance of the conviction.

[46] Section 42 of the Civil Proceedings Evidence Act, 25 of 1965 provides that the law of evidence in force in respect of civil proceedings on 30 May 1961, shall apply in any case not provided for by the Act or any other law. The law that was in force on that day, the day before South Africa became a Republic, was the English law of evidence. One of the rules so entrenched in the law of England was the so-called rule in *Hollington v F Hewthorn & Company Ltd*[28] in terms of which a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which her or she was convicted. The conviction is merely the irrelevant opinion of another court.

[47] The justification for the rule on the basis that it is merely an irrelevant opinion of another court is, with respect, flawed. A conviction forms part of a judgement by one or more Judges versed in law and experienced in evaluating evidence and the judgement is subject to an appeal process. Hoffman and Zeffertt in their 4th edition justifiably described the rule as *"almost unbelievable."*[29]

[48] The rule was abolished in England in 1968[30] where a conviction in a criminal court is now seen as evidence but not as conclusive proof of a fact. The party is *"taken to have*

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28 [1943] KB 587 (CA) ([1943] 2 All ER 35).
29 Hoffman and Zeffertt *The South African Law of Evidence* 4th ed 1988 p 93.
30 Civil Evidence Act of 1968.

committed the offence unless the contrary is proved." [31]

[49] Despite criticism[32] the rule is still part of our law.[33] In *Institute for Accountability in Southern Africa v Public Protector*,[34] Coppin J (as he then was) said that the rule is wrong and must be applied restrictively:

> *"Rather than breathing further life into the erroneous rule in Hollington through yet another application, or extension, a compelling case has been made out for its strict containment, and its abolition (or more appropriately, extirpation) for being wrong, as has occurred elsewhere."*

[50] I share all these reservations about the rule. This present matter however falls squarely within the ambit of the rule and I consider myself bound by the interpretation of the rule in the case law quoted above.

[51] Schmidt and Rademeyer[35] are of the view that section 3 of the Law of Evidence Amendment Act, 45 of 1988 satisfactorily addresses the problems that arise because of *Hollington*. The record of the evidence in the criminal trial may be placed before the Court in terms of section 34 of the Superior Courts Act, 10 of 2013 or in terms of section 17 of the Civil Procedure Evidence Act, and application may be made for the record to be admitted as hearsay. This is however not a complete answer as the decision of the trial Judge will still be opinion and will not constitute *prima facie* evidence of wrongdoing.

[52] It matters not that in the present matter the first applicant attended the trial and observed all the evidence led. If the presiding Judge's finding of guilt in the criminal court is not evidence

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31 S 11(1) and (2) of the Civil Evidence Act of 1968.
32 See Schmidt & Rademeyer *Bewysreg* 4th ed 2000, p 589.
33 *Groenewald NO and Another v Swanepoel* 2002 (6) SA 724 (E) 727E; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 42; *Danielz NO v De Wet* 2009 (6) SA 42 (C) para 18; *Nel v Law Society, Cape of Good Hope* 2010 (6) SA 263 (ECG) para 16; *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA) para 12; *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP) para 25.
34 2020 (5) SA 179 (GP) para 30.
35 Schmidt & Rademeyer *Bewysreg* 4th ed 2000, p 590.

that the crime was committed, the evidence of a lay person who observed those proceedings can hardly change the position.

[53] Because I am bound by *Hollington* I conclude that I may take no cognisance of the conviction even though it is common cause. The evidence presented by the applicant does not prove the offence that the third respondent was convicted of and the application for her to be declared an unworthy witness cannot succeed.

Costs

[54] In my view it is the *Hollington* rule that stands in the way of the applicants in respect of the prayer relating to her unworthiness to inherit. I dismiss the application for an order declaring her unworthy but make no order as to costs.

[55] In the review application the third respondent expressly distanced herself from the position that the proceeds of the life policy fall within the joint estate – an unarguable position given the case law and the academic writings – but then relied on insurable interest as a ground for opposition to the review and upholding the Master's decision. There is no merit in the argument. It is frivolous.

[56] The third respondent also brought an application for a postponement served on the day the application was set down for, being the day before oral argument, on equally frivolous terms.

[57] Instead of addressing the substance of the application the third respondent applied for portions of the founding and replying affidavit to be struck. She opposed the application for

condonation and claimed prejudice, but without outlining such prejudice.

[58] For these reasons I believe an punitive cost order is justified.

Conclusion

[59] For all these reasons I made the order quoted in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **19 MAY 2022**.

COUNSEL FOR THE APPLICANT:	L J MORISON SC G NGCANGISA
INSTRUCTED BY:	NINGIZA HORNER INC
COUNSEL FOR 3rd RESPONDENT:	T S SIDAKI (head of argument by V NGALWANA SC & T S SIDAKI)

INSTRUCTED BY:	DE KLERK & VAN GEND
DATE OF THE HEARING:	4 MAY 2022
DATE OF JUDGMENT:	19 MAY 2022