IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON, PRETORIA

Case No.: 60192/2015

28/3/2018

In the matter between:

JOSIAS CHABA MOLELE **Applicant**

and

DANIEL VAN HEERDEN **Respondent**

JUDGMENT

Sardiwalla J:

Introduction

1. This is an application for absolution from the instance in the main trial, brought on behalf of the Defendant, who is the Applicant in this matter, after the Plaintiff and Respondent closed their **case,** in terms of Rule 39(6) of the Uniform Rules of this Honourable Court.

The parties

2. The Applicant, is **Josias Chaba Molele, a** major businessman residing [….] and employed at [….][1].

3. The Respondent is **Daniel van Heerden ,** a major businessman of [….] [2].

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[1] Plaintiffs Particulars of Claim, **paragraph** 2
[2] Plaintiffs Particulars of Claim, paragraph 1

Background

4. On or about 15 August 2012 and at or near Midrand, Gauteng, it is alleged that the Applicant wrongfully and maliciously set the law in motion by laying a false charge of theft alternatively fraud against the Respondent with the police at Midrand, Gauteng, by giving them the false information contained in the affidavit [3].

Applicant's case

5. The Applicant's case can be summed up as follows: the Respondent in this application has dismally failed to make out a *prima facie* case for the Defendant to answer, hence the necessity of the Defendant, who is the Applicant *in casu* opening his case to refute the case which the Defendant has accounted to put up, has now fallen away, and this matter should end by way of the Applicant being granted absolution from the instance in the main trial, since there is no case for the Applicant who is the Defendant therein to answer[4].

6. The Applicant also seeks costs, against the Respondent, who is the Plaintiff that dragged the Applicant/Defendant to court, without having set out a basis necessary in fact and law to sustain a cause of action[5].

Respondent's case

7. The Respondent's case can be summed up as follows: The Respondent alleges that the Applicant wrongfully and maliciously set the law in motion by laying a false charge of theft, alternatively fraud against the Respondent with the police at Midrand, Gauteng, by giving them the false information contained in the affidavit. When laying the charge and providing the disinformation, Applicant-

   (1) Had no reasonable or probable cause for doing so,

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[3] Plaintiffs Particulars of Claim, paragraph 1
[4] Applicant's Heads of Argument, paragraph 2

(2) Did not have any reasonable belief in the truth of the information given; and

(3) acted with malice

8. As a result of the Defendant's conduct, criminal proceedings were instituted against the Plaintiff, and the Plaintiff-

(1) Had to obtain legal representation;

(2) Provide a warning statement to the South African Police Service;

(3) Incurred legal costs in dealing with the criminal proceedings; and suffered *contumelia*

9. The criminal proceedings against the Plaintiff terminated without any charges being preferred against the plaintiff. As a result of the Defendant's conduct the Plaintiff suffered damages in the amount of R500 000.00.

The law and application

Malicious prosecution

10. The test for malicious prosecution is set out in **Minister of Safety and Security v Moleko**[6] it was held that the following must be proven:-

In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

a) that the defendants set the law in motion (instigated or instituted the proceedings);

b) that (he defendants acted without reasonable and probable cause;

c) that the defendants acted with "malice " (or animo injunandi); and

d) that the prosecution has failed, (in this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further) the cases of Rudolph and others v *Minister of Safety*

[5] Applicant's Heads of Argument, paragraph 2
[6] [2008] 3 ALL SA 47 (SCA) at paragraph 8

and Security[7] *, and Minister of Safety and Security v Seymour*[8] *have discussed this issue as well.*

a) that the defendants set the law in motion (instigated or instituted the proceedings).

11. The Applicant who is the Defendant in the main trial admits that he initiated the criminal proceedings by reporting and opening up a case of fraud against the Respondent who is the Plaintiff in the main trial at the police station in Midrand in which he set out the relevant information in an affidavit. The Applicant denies that the criminal proceedings were however instituted against the Respondent in that the Respondent was never formally indicted by the National Prosecuting Authority or appeared before any Court of law and therefore no prosecution occurred[9]

12. The Respondent however is of the **view** that the charges or complaint laid by the Applicant were false and without such false statement the public official would not have instituted the proceedings. The respondent also submits that that Applicant should still be held liable even if he was only grossly negligent [10] and lastly prosecution includes the pre-trial leg constitutes part of the proceedings.

13. The correct legal position was stated as follows in **Waterhouse v Shields**[11] *and* **Madnitsky v Rosenberg**[12] **and both were approved by the Appellate Division in Lederman v Moharal Inv (Pty)** Ltd[13] , it was held that,

> *"A private person who gives to* a *public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving*

[7] 2009 (5) SA 94 (SCA) (also at [2009] 3 ALL SA 323 (SCA))
[8] 2006 (6) SA 320 (SCA)
[9] Applicant's Heads of Argument, paragraph 7
[10] Respondent's Heads of Argument, paragraph 16.6
[11] 1924 CPD 155, at 16
[12] 1949 (1) P.H. JS
[13] 1969 (1) SA 190 (A),at page 197

such information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. Where a *private person gives to* a *prosecuting officer information which he believes to* be *true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief therein was* one *which* a *reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.*

If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes *impossible and* a *prosecution based thereon is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by* a *public official, it must therefore appear that h.is desire to have the proceedings initiated expressed by direction, request, or pressure of any kind was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false."*

14. In essence the Respondent submits that the Applicant pleaded his own conclusions in his affidavit by stating that the cause of action and that the Respondent must be prosecuted as to oppose to material facts he would have to prove in order to sustain the cause of action. According to Respondent it thus lacks the requisite. particularity to allow firstly the public official to exercise his discretion in view of the information provided or the Respondent to plead thereto in a meaningful manner which he

submits is therefore malicious. In applying the *case supra* in order for the Applicant to be found liable, the information provided even if proven to be false must be one that a reasonable person would not entertain. In the present case the Applicant initiated the criminal proceedings where he claims that the Respondent acted without authority in changing the banking details of the Molele LGS (Pty) Ltd in the contract between Molele LGS (Pty) Ltd as a contractor with the Mogale City Municipality to Quill and Associates (Pty) Ltd without prior written consent or a resolution. It was conceded by the Respondent's witness Mr Kooi a Chartered Accountant, who is an expert in his field that where a director in the position of Mr Van Heerden was no longer a director of Molele LGS (Pty) Ltd, or a company, and then went on without the requisite authorisation from a company law perspective, in the form of a resolution from his own company and the company whose details he seeks to have removed and bearing in mind the stipulation of clause 7 on page 209 of Exhibit C which deals sets out the regulations for a transfer and cession of rights for contracting with a municipality, then the conduct of such a director would indeed be fraudulent. I must therefore accept the Applicant's version that he believed the facts stated to the public official to be true and one that a reasonable person would entertain. Therefore it cannot be said that the Applicant's intention was to have the proceedings initiated expressly by direction, request, or pressure of any kind was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false. The Applicant therefore escapes liability on this element.

15. The issue of the validity of transfer and cession of rights was not raised as a *point in /imine* in the present application or in the main trial and therefore is not an issue to be determined by this court.

b) <u>He had no reasonable or probable cause to do so</u>

16. Mr Kooi who testified on behalf of the Respondent conceded that any person acting without the requisite authority wherein he was no longer a

director of a company, such conduct would indeed be fraudulent. Therefore it can be concluded if a reasonable person in the position of the Applicant believed that the information he was providing to the police official was true that he had a reasonable cause for initiating criminal proceedings with a public official had a reasonable basis on fact and in law.

c) that the defendants acted with "malice " (or *animo iniunandi)*

17. The element of intention as proved above required for malice is absent. It has been accepted that a reasonable person in the position of the Applicant would have taken the same steps as the Applicant and therefore such actions cannot be considered to have been intended to be malicious.

d) that the prosecution has failed.

18. The Applicant submits that prosecution only commences once the main trial begins and this process excludes the pre-trial and investigative stages of the inquiry. Further that the Respondent was never formally indicted, therefore it cannot be said that the Respondent was under prosecution as there was no prosecution to begin with[14].• The Respondent submits that pre-trial stage forms part of the prosecution process is therefore an indication that prosecution had commenced. Further that in the pre-trial minute dated 28 October 2106 the Applicant denies that the proceedings were terminated[15]. He also submits that in all probability the prosecution was terminated as no progress had been made for a period of six years[16]. What therefore must be determined is whether termination of the criminal proceedings can be held as the same as the prosecution failing. In the *Zuma* case where he contested the reopening of the case, the Supreme Court of Appeal distinguished between *prima facie* evidence that would merit the prosecution of an accused and discharging the onus of proof

[14] Applicant's Heads of Argument, paragraph 11, 12, 13 and 14
[15]Respondent's Heads of Argument, paragraph 13
[16]Respondent's Heads of Argument, paragraph 22, 24 and 25

during a criminal trial. The court held that *prima facie* evidence does not need to be conclusive or irrefutable at the stage when criminal proceedings are instituted. It must have enough merit only once the criminal investigations are concluded "in the sense of reasonable prospects of success".[17] The rationale behind this requirement is to prevent the laying of spurious charges. Whether or not a case would actually be winnable in court is the domain of the judiciary and not the prosecutors. That decision depends on the evidence presented to the court under cross-examination, where the prosecution is required to present *prima facie* evidence of each element of the crime. Only if the prosecution can during the trial establish a *prima facie* case which is strong enough to discharge the burden of proof will the accused be required to rebut it by raising a reasonable doubt.[18] The court found that the trial court failed to comply with the basic rules of procedure when Nicholson J presumed that there was political meddling in the prosecution, even though this was not proved.[19] The court held that the motive behind a prosecution is irrelevant insofar as a crime that ought to be prosecuted had been committed.[20] The court concluded that it was difficult to see, in the light of the Shaik judgment, how the prosecution could have failed to prosecute Zuma.[21]

19. In **Lemue v Zwartbooi (1896) 13 SC 403 at 405,** De Villiers CJ said the following in this regard:

"For the first time the question has been raised in this court whether, in an action for malicious prosecution, the refusal of the Attorney-General or Solicitor-General to prosecute constitutes sufficient proof of a *termination of the prosecution in the Plaintiffs favour. It has been urged on behalf of the Defendant that such refusal is equivalent to a no/li prosequi which,*

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[17] *NDPP v Zuma (SCA)* paras 27, 43; see also Zeffert, Paizes and Skeen *Law of Evidence.130-121*
[18] S v Coetzee 3 1997 SA 527 (CC) para 195 ; Scagell v Attorney-General, Western Cape 2 1997SA 368 (CC) para 11
[19] *NDPP v Zuma (SCA)* paras 44 -54.
[20] *NDPP v Zuma (SCA)* para 37.

according to the English law, has been held not to terminate the prosecution.

Considering, however, the wide difference between the functions of the Attorney-General, as well as the systems of criminal prosecution in the two countries, the English precedent cannot be regarded as *binding her."*

And further at page 406:

"In this country the public prosecutor really performs the functions of a *grand jury in addition to his other duties. He indicts where the preliminary examination discloses* a *prima facie* case *against the accused, but he declines to prosecute it there is no reasonable prospect of a conviction by an impartial jury. This refusal to prosecute does not operate* as *res judicata so as to prevent a future prosecution for the offence charged, for it has been held that the Attorney-General may indict in the case where the Solicitor-General has declined to prosecute (which is not the position at present) and the private party who has suffered injury by any crime or offence* may, *subject* to *the restrictions mentioned in Ordinance No. 40 prosecute (private prosecution now provided for in the Criminal Procedure Act where the public prosecutor has declined to prosecute) But* so *far* as *the original proceedings are concerned, !hey are terminated by the public prosecutor's refusal to prosecute. This view has been taken for granted in numerous actions for malicious prosecution which have been brought in this court."*

And further at 407:

"While a *prosecution is actually pending its results cannot be allowed to be pre-judged by the civil action, but as soon as the Attorney-General, in the*

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[21] *NDPP v Zuma (SCA)* para 51

exercise of his quasi judicial function, has decided not to prosecute, there is sufficient termination of the original proceedings to allow of the civil action being tried. A different view of the law would lead to the extraordinary result that the clearer the proof of a person's innocence is, the greater difficulty would he have in obtaining damages for false and unfounded charges maliciously made against him. On the other hand, the law, as I have stated it to be, need not lead to any hardship on the Defendant in an action for malicious prosecution. If, after the Solicitor-General n has refused to prosecute, there is a reasonable possibility that the Attorney-General will prosecute or an undertaking by the Defendant himself to prosecute without delay, it would be quite competent for the court to postpone the civil trial until after the verdict in the fresh criminal proceedings. In the present case there was no suggestion that the Attorney-General was likely to prosecute the Plaintiff for perjury, or that the Defendant himself intends to institute a private prosecution for that offence".

20. I applying the above *cases supra* to the present case the Applicant was not required to submit *prima facie* evidence that was conclusive at the stage of initiating or instituting the criminal proceedings against the Respondent. Further that the motive behind the initiation of the proceedings were irrelevant as the crime of suspected fraud and theft is a crime that ought to be prosecuted if the complainant has a reasonable belief that such crime has indeed been committed. There also is no suggestion that even though the criminal proceedings may have been terminated that the Applicant does not intend to institute a private prosecution for the offence, in which case it would have the effect of suspending the present civil action. In the present case and in light of the evidence presented before me I find it difficult to see how the prosecution could have failed or why it was terminated and I am of the view that termination in this instance cannot be viewed as the prosecution failing.

21. Having regard to the above I therefore conclude that the requirements for

malicious prosecution have not been met.

Damages

22. *In casu* the Plaintiff bears the onus to prove that he has suffered damages and also quantum thereof; **Vide Momentum Art CO v Kenston Pharmacy,**[22] Rose Innes AJ, as he was then, said:

> *"the onus rest upon plaintiff to prove not only that its goods have been damaged, but also the amount of the damages thereby sustained. I apply with respect the dicta of Muller AJA,* as *he then was in* ***Erasmus v Davis*** *case at 19A where he said:*
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> *'it is for the plaintiff to establish not only he has suffered damages but also the quantum thereof. Consequently it is for the plaintiff to show that the method which he employs is appropriate to that the evidence produced by him establishes the quantum of the damage which he has suffered'.*

23. It is not in dispute that criminal proceedings were initiated against the Respondent. It is also not in dispute he never appeared before a Court of law and that only pre-trial stages were reached before the matter was withdrawn.

24. It is however in dispute that there were legal costs incurred by Van heerden in defending the criminal matter which amounted to R18 000 as claimed for in his particulars of claim[23]. The Applicant in this regard has pointed out and correctly so in my view that there is no documentary evidence from the Respondent's counsel or the attorneys to substantiate the claim for the legal costs[24]. Further that in his evidence in chief the Respondent abandoned his claim for loss of income of R 15 000[25], to which again no expert or documentary proof of calculations has been provided to this Court. Where no evidence is led to prove the calculations

[22] 1976 (2)SCA (CPD) 111 at 120 C-E
[23] Particulars of Claim, paragraph 7.1
[24] Applicant's Heads of Argument, paragraph 13 and 14

of the amounts claimed for damages the Court in this regard held At page 118D-F Innes AJ, as he then was continued to say... . *"the court does not have to embark on conjecture in assessing damages where there is no factual basis in evidence or, an in adequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff which has failed to produce available evidence upon which assessment of the loss could have been made. For the plaintiff to succeed in his claim, he must proof all the elements claimed required to be proved'.*

25. Further Rule 18 (10) states as follows:

A plaintiff suing for damages shall set out in such manner as will enable the defendant reasonably to access the quantum thereof: provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of injuries, and the nature effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any is claimed for-

(a) Medical costs and hospital and other similar expenses and how these costs and expenses are made up,

(b) Pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) Disability in respect of-

i. the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

ii. the enjoyment of amenities of life (giving particulars);

and stating whether the disability concerned is temporary or permanent and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent

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[25] Particulars of Claim, paragraph 7.2

26. Having regard to the onus placed on the Respondent to produce evidence deducing the quantum claim for, the Respondent has provided no evidentiary or documentary proof to substantiate his calculation for damages. As held in the *case supra* the Plaintiff in order to succeed with his claim must prove all elements and it is not for the Court to assess the amount of damages were there is no factual basis and no evidence to support the claim. In the absence of the evidence in support of the elements required the claim for damages must fail.

Contumelia

27. Where a person's bodily integrity has been wrongfully and intentionally infringed, he or she can claim satisfaction with the *actio iniuriarum* unless the principle *de minimis non curat lex* applies to his or her claim. The defendant is then liable for all the personality harm which flows from the infringement of the plaintiff's physical integrity in so far as the general nature of the harm was reasonably foreseeable. The amount which is awarded as satisfaction is estimated according to what is just and equitable *(ex aequo et bono).* Because *solatium* is awarded primarily for injured feelings, the quantum of damages is first of all dependent on the extent or intensity of the physical and mental suffering or sentimental loss which the plaintiff has experienced as a result of the *contumelia* or contempt of his or her body.

28. *Contumelia* must in this context not be understood as a synonym for insult, but rather as a description of the plaintiff's feelings of having suffered an injustice. For this reason provocation by the plaintiff or an apology by the defendant, or the plaintiff's social or cultural status may influence the amount of satisfaction. In addition, awards in previous cases, allowing for inflation, must be properly considered. Where other personality interests are also affected, such as dignity or *fama,* the amount of damages may be increased accordingly.

29. Compensation for pain, suffering, disfigurement and loss of amenities of

life associated with assault is recovered by means of the action for pain and suffering and not the *actio iniuriarum.* Therefore, in instances of assault, these two actions are both available. This also appears impliedly in case law, where a distinction is drawn between satisfaction for *contumelia* and compensation for pain and suffering.

30. The Applicant denies that the charges were terminated against the Respondent and further that the Respondent suffered *contumelia.* The Respondent in my findings above has not produced expert evidence or evidence any family member to support any claim for physical, mental suffering or sentimental loss incurred as defined above. In fact by concession of the Respondent's own witness that the conduct of person who acts without the requisite authority of a company to which he is no longer a director of, is fraudulent. The correct approach was stated in **De lange vs Costa**[26] is that the test to be applied in determining whether the act complained of is wrongful must be assessed in accordance with reasonableness and the prevailing norms of society. In this instance the prevailing norms of society would require that the act of fraud in all reasonableness be prosecuted and would consider that actions of the Applicant in initiating criminal proceedings against the Respondent reasonable in the circumstances. I am therefore of the view that the element of wrongfulness or intentionally malicious and that any injustice was suffered by the Respondent which is required to succeed on a claim of *contumelia* is absent.

Absolution from instance

31. "Absolution" as defined is an act of freeing from blame and releasing from consequences, obligations or penalties. "Instance" refers to "a particular case". It then follows that absolution from the instance is a state of being released from a particular case. In South African law, the decree of absolution from the instance amounts to an order granted to dismiss the plaintiff's claim on the basis that no order can be made.

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[26] [1989] 2 All SA 267 **(A),** at page 271.

32. Rule 39 (6)states that at the close of the case for the plaintiff, the defendant may apply for absolution from instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or none advocate on his behalf my reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.

33. The correct approach to absolution application is conveniently set out by Harms JA in the case of **Gordon Llyod Association v Rivera and Another:**[27]

[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in the case of Claude Neon Lights (SA) Ltd v Daniel.... ..

> *"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally* be *required to be established, but whether there is evidence upon which* a *Court, applying its mind reasonable to such evidence could or might (not should, nor ought to) find for the plaintiff.*[28] *The plaintiff has to make out* a *prima facie case in the sense that there is evidence relating to all the elements of the claim".*

34. This implies that a plaintiff has to make out a prima facie case- in the sense that there is evidence relating to all elements of the claim- to survive absolution because without such evidence no court could find for the plaintiff.[29] As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be reasonable one, not the only reasonable one {Schmidt at 93). The test has from time to time been

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[27] 2001 (1) SA 88 (SCA) at 92E-93A
[28] Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T)
[29] Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (I) SA 26 (A) at 37G-38A, Schmidt Bewysreg 4th ed at 91-2

formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff {Gascoyne (*loc cit))* - a test which had its origin injury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone concerned with its own judgment and not that of another "reasonable" person or court. Absolution at the end of the plaintiff's case, in the course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.

35. Hattingh J found that the test to be applied in determining the question whether the defendant's application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. Consequently, at the absolution stage the plaintiff's evidence should hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff's evidence has satisfied this test, absolution ought to be refused[30].

36. In applying the test and principles of the cases *supra* to the Respondent, the Respondent has failed to make out a case of malicious prosecution and prove the existence of damages and that he suffered any *contumelia* on his own version as it stands.

Conclusion

37. Based on the above, I conclude that the Respondent has failed to provide sufficient evidence to even establish a *prima facie* case that the prosecution was malicious and he had been suffered any *contumelia* by the actions of the Applicant. This Court, in applying its mind reasonably to the Respondent's case and evidence, simply cannot conclude at the

[30] See: Build-A-Brick BK en 'n Ander v Eskom 1996 (1) SA 115 (0) at 123 A - E. See also Schmidt

conclusion of such evidence led that the Court could ultimately find in his favour. The application for absolution from the instance must therefore succeed.

Order

38. **I make the following order:**

a) The application for absolution from the instance in the main trial is granted

b) The Respondent shall bear the costs of this Application and the main trial on an attorney and client scale.

C M SARDIWALLA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

APPEARANCES

Date of hearin	: 12 FEBRUARY 2018	
Date of Judgment	: 28 MARCH 2018	
Counsel for the Plaintiff ADV	:	PW MAKHAMBENI
Applicant's Attorneys L	:	ACHPORIA ATTORNEYS
Counsel for the Respondent	:	ADV.: S. D. WAGENER SC
Respondent's Attorneys	:	A. L. MAREE INC

C W H, Law of Evidence, loose (1) leave edition, p. 3-16 to 3-18.