IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 84019/16

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

10 March 2021 

DATE SIGNATURE

In the matter between:

LS MASENYA First Applicant

MURCUS M FARMING CC Second Applicant

and

TAU ROLLERMEULE (PTY) LTD Respondent

In re

TAU ROLLERMEULE (PTY) LTD Applicant

and

MURCUS M FARMING CC Respondent

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NEUKIRCHER J:

1] This is an application for recission of an order granted on 15 November 2016 which reads as follows:

> *"That the attached Settlement Agreement marked Annexure "A" be made an order of this Court."*

2] The application for recission[1] was served on 20 August 2019 i.e. 2 years and 9 months later.

3] In essence, the relief sought by the present applicants[2] is the following:

3.1 condonation for the late filing of the recission application;

3.2 joinder of first applicant[3] to the proceedings as he was not a separate party in the main proceedings[4];

3.3 recission of the order granted on 15 November 2016;

3.4 certain declaratory orders that the credit application and suretyship signed by applicants on 17 October 2013 and 10 March 2016 respectively are

3.4.1 credit agreements; and

3.4.2 that they constitute reckless credit in terms of s80(1)(a) or s80(1)(b)(i) or s80(1)(b)(ii) of the National Credit Act no 34 of 2005 (the NCA); and

3.4.3 that they be set aside alternately declared reckless;

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1 Brought under Rule 42(1) alternatively the common law

2 The parties are referred to as in the recission application and not the main application

3 Mr Masenya

4 What is referred to as "the main application" or "the main proceeedings" in this judgment is the application to make the Agreement an order of court

3.5 alternatively that respondent be directed to comply with s129[5] of the NCA.

4] It is respondent's position that:

4.1 the recission application is late and fails to provide a proper explanation not only as to why the applicants (and in particular the second applicant) failed to defend the main application, but why this application was launched more than almost 3 years later; and

4.2 the recission application fails to establish a *bona fide* defence.

The joinder application

5] The first applicant, as sole member and director of the second applicant, seeks to be joined in the main proceedings as he states that he has a direct and substantial interest in the proceedings. This, he says, arises out of the suretyship which he avers is the subject matter of this application and which he alleges is linked to the Credit Agreement and the Settlement Agreement (the Agreement) concluded between the Respondent and the second applicant.

6] Rule 10 provides as follows:

*"**10 Joinder of Parties and Causes of Action***

(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a

[5] s129(1) as read with s130

separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

(2) A plaintiff may join several causes of action in the same action.

(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action…"

7] It is clear from the main proceedings that the Agreement was concluded between second applicant and the respondent. The terms of the Agreement relate to the debt owed to respondent by the second applicant. The only participation by the first applicant as regards the Agreement was that he signed it on behalf of second applicant. The *lis* was thus not between respondent and first applicant and no right which respondent may have against first applicant personally is sought to be enforced.

8] It has been stated by our courts that even though a person has, in his personal capacity, concluded the contract which an applicant seeks to

enforce[6] against a corporation, relief against the corporation is not precluded by a failure to join the signatory to that contract. It is also not necessary for a creditor to join, as defendant, debtors who are jointly and severally liable for the debt sued upon[7].

9] In **Parekh v Shah Jehan Cinemas (Pty) Ltd**, Leon J stated[8]

"The argument for the respondents on this part of the case does not appear to me to rest upon any firm foundation. The rule relating to non-joinder is one of convenience raising a question of practice and not one of substantive law. The modern practice is clear: in the case of joint and several debtors a creditor may select his target. And the great weight of authority supports this practice. Christie Law of Contract at 249 states the position as follows:

> *'In respect of these debtors who are jointly and severally liable each is liable to the creditor for the full amount of the debt and the creditor can at his option claim the full debt or any lesser amount from any of them provided he does not receiver in total more than the full amount of the debt' "*

10] A "direct and substantial interest" has been held to be

"… an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation[9].

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6 Wholesale Provision Supplies CC v Exim International CC 1995 (1) SA 150 (T) at 158D-I

7 1982(3) SA 618(D)

8 At 622E-G in respect of an argument that, as third respondent had passed away applicants were precluded from continuing with the suit, until third respondent executor had been joined

9 Bohlokong Black Taxi Association & Interstate Bus Lines (Edms) Bpk 1997 (4) SA 635 (O) at 644A-B

11] It is thus *"… a legal interest in subject-matter of the litigation excluding an indirect commercial interest only."*[10]

12] The "subject-matter" of the present litigation is the Agreement entered into between the parties in September 2016 which was signed by virtue of the debt owed by second applicant. The first applicant seeks to be joined because he states that the suretyship he signed on 10 March 2016 provides him with a direct and substantial interest because it is linked to the present application and the Agreement.

13] But the suretyship is irrelevant for the purposes of the present proceedings as order was sought and granted solely against second applicant on 15 November 2016 and no liability in respect thereof for the first applicant arises by virtue thereof.

14] Where the suretyship is however relevant is in the proceedings under case no 193/2018 in the Magistrate's Court, Ventersdorp. This action is against the first applicant and it is based on the suretyship. That action is still pending.

15] In my view, the proceedings before me have nothing to do with the suretyship – in fact the Agreement itself makes no mention of it and thus no personal consequences flow from the judgment that was granted against second applicant for first applicant.

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[10] Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (0) at 169, 170; Burger v Rand Water Board 2007 (1) SA 30 (SCA) at paras 7-9

16] What is more, all defences that first applicant now raises must be raised by him in the Magistrate Court where they can be adjudicated.

17] In light of this and the fact that there are pending proceedings against first applicant in Ventersdorp on the issue of the suretyship, he has no personal direct or substantial interest in the subject matter of the present application and the application for joinder is therefore dismissed.

Background

18] The respondent is a supplier of chicken feeds. The second applicant farms with chickens and its sole member and director is the first applicant. It appears, from all that is before the court, to be common cause that it was first applicant who opened an account with respondent on behalf of second applicant, on 17 October 2013 and who signed a suretyship on 10 March 2016. The purpose of this credit facility was to ensure that respondent would supply second applicant with chicken feed and related goods on credit.

19] Until approximately 2016 the second applicant's account was in good order. However the second applicant began defaulting on its obligations to pay and was in default in an amount exceeding R5 million. The result was that during +/- August 2016 the respondent communicated its intention to institute legal action against second applicant in respect of monies owed in respect of the chicken feed sold and delivered.

20] On 28 September 2016 first applicant, on behalf of second applicant, signed

the Agreement in which the second applicant admitted

20.1 it owed respondent R5,395,962.30 as at 23 September 2016; and

20.2 it could not pay the full amount outstanding.

21] The parties also agreed that the Agreement could be made on Order of the Court.

22] The parties agreed to certain terms of payment and

"3.7 if the Defendant does not adhere to his obligations in terms of this agreement and/or if any other condition of this agreement is not adhered to … the Plaintiff will, apart from any other rights which the claimant may have, be entitled to apply for judgment against the Defendant, without any notice of the Defendant and may continue with any further action to collect the outstanding debt amount and/or will be able to apply for the liquidation of the Defendant and/or any other action or application."

23] On 25 October 2016 the Respondent brought an application in which it sought an order that the Agreement be made an order of Court. As stated in paragraph [1] *supra*, that application was granted.

24] On 6 December 2016 respondent's attorney sent a letter of demand to second applicant in which it demanded payment of an amount of R5,440,032.98 which it alleged was owing as at 30 November 2016 and stated *"it is our instructions to apply to court for judgment for the said outstanding amount and continue*

with the collection process in this regard."[11]

25] On 1 March 2017 the second applicant's attorney, Gildenhuys Botha Inc, wrote to respondent asking it to withdraw a warrant of execution that had been issued on 17 February 2017[12] and asked the respondent for an indulgence and further time to pay.

26] During May 2017 second applicant undertook to pay R40,000 to R50,000 every 30 to 50 days to liquidate its debt. Between 11 July 2017 and 8 February 2018 second applicant made payments totalling R227,908.60 and it states:

"39. It was on the basis of the aforesaid payment arrangement and/or Settlement Agreement that the Applicants did not consider to launch this Application. In fact, it was not necessary to even consider launching this Application.

40. This was exacerbated by the fact that the Applicants were not legal (sic) presented."

27] On 6 August 2017 the Gauteng Division, Pretoria, granted judgment in favour of the Land and Agricultural Development Bank of South Africa (the Land Bank) against second applicant as second applicant had defaulted on its

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[11] In terms of clause 3.5 of the Settlement Agreement which states

"2.3 It all the chickens could not be sold within the next six weeks, the Plaintiff will have the choice to either give back the remaining chickens not sold to the Defendant and request the Court for judgement, without any notice to the Defendant for the outstanding balance then due and payable, or to extend this six week period for another period and/or periods to sell the remaining chickens and then request the Court for judgement, without any notice to the Defendant, for the outstanding balance then due and payable…"

[12] i.e subsequent to the Agreement being made an order of court

obligations to the Land Bank. It is stated in the Application for Condonation[13] that an appeal was pending to the Full Bench to be heard on 19 August 2020 – nothing was placed before me regarding the outcome of this appeal.

28] On 21 November 2018 respondent instituted action against first applicant in the Magistrate's Court Ventersdorp based on the suretyship signed by first applicant as set out in paragraph [5] supra.

29] The third application between these parties is the application for liquidation brought by respondent against second applicant in October 2018. A provisional order of liquidation was granted on 12 September 2019 and on 29 July 2020 judgment was handed down by Maumela J discharging the rule and dismissing the application.

30] Of course, the second applicant states that the provisional liquidation order suspended the recission application which was delivered on 20 August 2019 about three weeks before the *rule nisi* in the liquidation application was granted. The Application for Condonation for the late institution of the recission application was served on 7 August 2020 once the provisional order of liquidation had been discharged.

31] There is, however no explanation why the Application for Condonation was not launched at the same time as the recission application.

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13 See paragraph [30]

32] It is thus common cause on these papers that:

32.1 the recission application was launched two years and nine months after the Agreement was made an order of Court;

32.2 the application for condonation was launched just shy of a year after that.

Recission Application

33] There are three ways in which a judgment granted in the absence of a party may be set aside:

33.1 Rule 31(2)(b); or

33.2 Rule 42(1); or

33.3 at common law[14].

34] This application is launched in terms of Rule 42(1) alternatively the common law.

35] Rule 42(1) provides as follows:

"(1) The court may in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby…"

36] In **Tshabalala and Another v Peer**[15] the Full Court stated that if the Court

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[14] Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W) at 578 B-C; De Wet and Others v Western Bank Ltd 1977 (4) SA 770 (T) at 776E

[15] 1979 (4) SA 37 (T)

holds that an order or judgment was erroneously granted in the absence of any party affected thereby it should, without further enquiry, rescind or vary the order. However it does not appear from this judgment that there was any issue regarding when the recission application was launched. It appears that judgment was granted in the absence of defendant on 10 April 1974 and *"thereafter the first, second, third and fifth defendants each brought an application for recission of the default judgment…"*

37] In **Topol and Others v LS Group Management Services (Pty) Ltd**[16] Shakenovsky AJ, in following **Tshabalala** (*supra*), found that it is not a requirement for recission under Rule 42(1)(a) that an applicant need, in addition, establish good cause for recission or a *bona fide* defence[17], however in the absence of an error in the proceedings, the applicant must fall back on either Rule 31(2)(b) or the common law in respect of which he must show good cause.

38] In **Avenet South Africa (Pty) Ltd v Lesiva Manufacturing (Pty) Ltd and Another**[18] the parties, who were not involved in litigation, had concluded a settlement agreement in respect of moneys first respondent owed applicant and the applicant then applied to make the settlement agreement an order of court. Budlender AJ stated the following when refusing to make the agreement an order of court:

"[27] After having considered the relevant authorities, I have concluded that I

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16 1988 (1) SA 639 (W)
17 Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E)
18 2019 (4) SA 541 (GJ)

have no power to make the present settlement agreement an order of court.

[28] It seems to me that the approach taken in Eke v Parsons[19] and PL v YL[20] while not binding on me, is correct.

[29] The practice of making a settlement agreement an order of court has a long history in common law. However this invariably appears to have taken place where the settlement agreement was reached between the parties which were already engaged in litigation. Apart from the Growthpoint Properties[21] case, … there appears to be no judicial support for the contention that a court has a power to make a settlement agreement an order of court where litigation has not commenced by the time that the settlement agreement is concluded.

[30] This is unsurprising. The primary function of the courts is to determine disputes between the parties. The basis up on which a court makes a settlement agreement an order of court is therefore that there is a dispute between the parties which is already before the court and that, absent the settlement agreement the court would have to adjudicate that dispute…

[34] A breach of a court order is a serious matter. Disobedience of a court order constitutes a violation of the Constitution and can give rise to contempt proceedings, with consequences such as incarceration. It does not seem permissible or appropriate for parties to be free to clothe their agreement with these consequences, in circumstances

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19 2016 (3) SA 37 (CC) 2015 (11) BCLR 1319; [2015] ZACC 30); dictim in para [25] applied

20 PL v YL 2013 (6) SA 28 (ECG) ([2013] 4 ALL SA 41); dictim in para [15] applied

21 Gowthpoint Properties Ltd v Makhonya Technologies (Pty) Ltd and Others (2013) ZAGPPHC 43

where the agreement is not resolving a matter already before the court."

39] In **Eke v Parsons** (*supra)*[22] the court stated:

"[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must in the first place 'relate directly or indirectly to an issue or lis between the parties'. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this issue Hodd[23] *says:*

> *'If two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the court would not grant the application.'*

That is so because the agreement would be unrelated to litigation."

40] But that is precisely what occurred in this matter – an agreement that was entirely unrelated to litigation (because none had been instituted) was

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22 At para [25]

23 Hodd v Hodd; D'Aubrey v D'Aubrey 1942 NPD 198

elevated to the status of a court order and this by agreement between the parties.

41] In the present case the bases upon which the second applicant asks that the recission be granted are varied but, in my view, given the fact that no action preceded the parties Agreement being made a court order, the only one which is presently relevant is that relating to Rule 42(1)(a).

42] It is clear from the above authorities that on 15 November 2016 the court erroneously granted an order as set out in para [1] *supra* and this being so the order should be set aside.

Condonation

43] However, in the present matter, that is not the end of the enquiry as it is common cause that this recission application was launched two years and nine months late in circumstances where the second applicant had had notice of the original application, had received correspondence pertaining to the order granted and a demand for payment pursuant to that, had consulted attorneys during early 2017, sought an opinion from counsel regarding a possible counterclaim and paid R278,908.60 between July 2017 and March 2018.

44] The defence that the applicants were not represented when the Agreement was signed in 2016 is no defence at all and even if it were, on its own version an attorney was consulted in early 2017 – had it truly intended to contest the

Agreement or had a defence to its terms, a recission application should have been brought then. It was not and instead a payment arrangement was entered into.

45] Thus, it appears that second applicant acquiesced in the order.

46] In **Kouligas and Spanoudis Properties (Pty) Ltd v Boland Bank Bpk**[24] the court found that in circumstances where facts come to a defendant's knowledge which constitute a good defence only after default judgment is granted, the judgment should be rescinded. However

46.1 in this matter judgment was granted on 11 July 1985;

46.2 on 7 August 1985 defendant decided to bring the recission application; and

46.3 the application was signed on 3 October 1985 and enrolled for hearing on 11 October 1985 i.e. three months after judgment was granted.

47] However, in **Morkel ABSA Bank Bpk en 'n Ander** (**Morkel**) [25], the court found that an applicant who has been in wilful default cannot apply for a recission of judgment if he or she becomes aware of a possible defence <u>after</u> judgment has been granted against him/her.

48] In **<u>Morkel</u>**

48.1 after initially defending the action, the defendant withdrew his defence and signed a consent to judgment on 22 October 1993;

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[24] 1987 (2) SA 414 (O)

[25] 1996 (1) SA 899 (C)

48.2 he defaulted on his undertakings and judgment was granted against him by default on 24 May 1994;

48.3 the application before the court was in respect of an interdict to stop a sale in execution pending an application for recission of judgment. The former was instituted on 27 September 1994 i.e. 11 months after the consent to judgment and four months after judgment was granted.

49] In discussing the **Kouligas** judgment (*supra*) Steyn AJ, in disagreeing with it stated:

"Indien 'n verweerder subjektief kennis het van die feit dat, indien hy nie verdediging aanteken nie 'n vonnis teen hom gegee kan word sonder verdere kennisgewing aan hom (ooreenkomstig die beplaings van Hofreel 17(2)(a) of (b), saamgelees met Vorm 10 en Vorm 9 van die Eerste Bylae, onderskeidelik) en hy besluit om nie verdediging aan te teken nie, is so 'n verweerder, myns insiens, opsetlik in versuim."

50] In **Roopnarain v Kamalapathy and Another**[26]

50.1 judgment was obtained on 25 September 1970; and

50.2 the application for recission was served on 26 March 1971 i.e. six months later.

51] In refusing the recission application, James JP stated:

"Although the Rule[27] does not apply to motion proceedings it is, nevertheless, a pointer to what would be a reasonable time within which to seek recission in

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26 1971 (3) SA 387 (D)

27 In this case the referral was to Rule 31(2)(b)

a case such as the present one. Roopnarain has exceeded such a reasonable time by many months. As was said in Saloojoe and Another NNO v Minister of Community Development, 1965 (2) SA 135 (AD), there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. In my view the limits have been exceeded in this case by a large margin"[28].

52] But as stated *supra*, the second applicant does not need to show "good cause" for the recission. What it needed to demonstrate is why condonation for the late filing of the recission application should be given.

53] R42(1)(a) is *"a procedural step to correct designed to correct expeditiously an obviously wrong judgment or order*" [29] but even so the application must be brought within a reasonable time.

54] The words "reasonable time" form a somewhat elastic concept and depend on the facts of each case.[30]

55] As was pointed out by Eloff JP in **First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: in re First National Bank of South Africa Ltd v Jurgens**[31]

"Even if it can be said that the order granted by Coetzee J was erroneously sought or contains a patent error, the application should, in my view, have

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28 At 391B-D

29 Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471 E-F

30 Promedia Drukkers & Uitgewers (Edms) Bpk v Karmowitz 1996 (4) SA 411 (C) at 421(G) where the court found a delay of two and a half months not to be a bar

31 1994 (1) SA 677 (T) at 681B-G

been dismissed by reason of the long time lapse. As mentioned previously, the appellant's attorney uplifted the order on approximately 10 September 1988. The application in situ was launched on 18 November 1991, more than three years later. Rule 42(1) was designed, as was said in Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471E-F, 'to correct expeditiously an obviously wrong judgment or order'.

The need to proceed rapidly to correct an order mistakenly granted was mentioned by Trollip JA in Firestone South Africa (Pty) Ltd v Gentiruco AG 1977(4) SA 298(A) at 306H

'Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases …'

That was admittedly said in relation to the common-law power of correcting an order of Court, but the reasoning applies equally well to applications under Rule 42(1).

It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by Rule 42(1) is a discretionary one (see Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 882 (A) at 862 in fine 863A) and it would be a proper exercise of that discretion to say that, even if the appellant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than the three years referred to."

Conclusion

56] In the present case, not only was the application for recission brought two years and nine months after the order was granted, but it was not accompanied by a proper Application for Condonation. That was launched a year later.

57] I agree with Eloff JP that there must come a time in every matter where the parties must reconcile themselves to the certainty that a judgment or order brings. It can never be in the interests of justice that years after an order is granted Pandora's Box is opened and the parties are again plunged into the vortex of litigation. It would defeat the entire purpose of the finality of an order especially in circumstances like the present one where the second applicant not only entered into an agreement but was notified that judgment had been granted, had received legal advice within four months of an order being granted by consent and in respect of which it made payments to liquidate its debt.

58] I am of the view that this application was not brought within a reasonable time and that condonation should therefore be refused. This being so, the application for recission of judgment, in this matter, falls to be dismissed and costs must follow the result.

Order

59] Thus, the order I make is the following:

59.1 the application for joinder is refused;

59.2 the application for condonation for the late filing of the recission application is dismissed;

59.3 the application for recission of judgement granted on 15 November 2016 is dismissed;

59.4 the applicants are ordered to pay the respondent's costs.

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NEUKIRCHER J
Date of hearing: 9 February 2021
Date of judgment: 10 March 2021
Note: The parties agreed that the application could be decided on the papers

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be 10 MARCH 2021.

Counsel for applicants: Mr Mofokeng
Instructed by: Ndobe Inc Attorneys
Counsel for respondents: Adv F J Erasmus SC
Instructed by: De Kocks Attorneys