



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: A270/20

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE:¹² MAY 2022

SIGNATURE

In the matter between:

MARY TONDOLO t/a TONDOLO PARTNERSHIP

Applicant

and

M.J. MBOYA PROJECT MANAGERS CC

1st Respondent

MHLAWAKHE JOEL MBOYA

2nd Respondent

J U D G M E N T

MANYATHI, AJ

INTRODUCTION:

- (1) This is an appeal to a full court that emanates against the judgment handed down by our brother Mabuse J on 2 July 2019, dismissing the Appellant's claim with costs. On 22 August 2019 leave to appeal to the full court of this division was granted by the *court a quo*. The evidence of the parties is already on record. Only relevant portions of the evidence on record will be referred to for purpose of emphasis or if need be. This judgement will only focus on aspects which forms the subject of this appeal.
- (2) It is my view that the court need briefly state the history of this matter before us, for reasons that will follow hereinafter. After institution of the action in December 2015, it proceeded to a summary judgment application. Due to the defences raised, leave was granted and the matter proceeded to trial. The matter suffered some delay due to Respondents' failure to provide proper or sufficient discovery. As aforesaid, after the presentation of evidence, the appellant's claim was dismissed.
- (3) Pursuant to the granting of leave to appeal as early as 20 July 2020 the date of hearing of the appeal was set. The Respondents were properly notified of the appeal hearing date. There was no response from the Respondents. The appeal proceedings were set-down for 04 November 2021. On the 02 November 2021, a notice of withdrawal as attorneys of record was filed by the Respondents' attorneys, citing a lack of financial instructions as the reason for withdrawal. On the day of the hearing a new attorney appeared on behalf of the Respondents requesting

postponement of the matter for him to prepare as he was only instructed two days before the appeal hearing.

(4) The court dismissed the application for postponement and applied the Provision of Section 19 Supreme Court Act¹, on the following reasons:

1. The manner the Respondents pleaded in the main action unduly delayed the finalisation of the proceedings.
2. While the Respondents had been aware of the pending appeal for a period of a year, no action was taken.
3. The record constitutes 27 Volumes and for a court to read all that in preparation of an appeal, only to be informed a day before hearing that the Respondents are not ready to proceed and with no tangible reasons provided for such application, amounts to an abuse of process.
4. More importantly, it is incumbent on the courts to make sure that every litigant's Constitutional right to speedy finalisation of their matters is achieved, thereby preventing unnecessary costs or financial prejudice for both parties involved.

(5) As a result of the above-mentioned reasons, the court proceeded to consider the appeal in order to finalise the appeal proceedings and to

¹ Supreme Court Act

put closure on this matter that has been in the roll of this court for a period of five years.

FACTUAL BACKGROUND:

- (6) During June 2011, the North-West Department of Health issued a tender for the building of four Community Health Centres in various areas in the Province. The first Respondent (Mboya Project Managers CC) was appointed as the Project Manager of all those projects. First Respondent then appointed the Appellant (Tondolo Partnership) as the architect in all the projects².
- (7) The First Respondent and the Appellant entered into a verbal agreement in respect of the manner of payment and written agreement as far as the fee structure was concerned. During the period November 2011 until July 2015 the Appellant provided architectural services as agreed and to the satisfaction of the First Respondent. The Appellant invoiced the First Respondent for work done and completed during that period. The First Respondent paid the Appellant but and some invoices were not paid.
- (8) During 2015 a considerable friction ensued between them as a result of this non-payment. As a result of the non-payment of invoices submitted to the first Respondent for work done, the Appellant refused to provide further services. Pursuant to this the First Respondent on the 28 July

² Vol 2, pp 142 - 143 – Plea parag 18 – 18:5

2015 addressed a letter to the Appellant, terminating Appellant's contract³.

- (9) Subsequent to that the First Respondent ignored all the demands for payment. On the 12 December 2015 the Appellant instituted legal action for the amount owing and due to her. The Second Respondent was sued in his personal capacity as the sole director of the First Respondent, jointly and severally for the debts of the First Respondent.

APPELLANT'S VERSION ON THE PLEADINGS:

- (10) The Applicant's version is to the effect that a contract was entered between her and the Second Respondent in his capacity as the First Respondent's representative and sole director. Their contract was partly oral and partly written. The Appellant performed architectural services on four Community Health Centres. Invoices for the work done were submitted to the First Respondent for payment, who in turn would invoice the Department for payment of such invoices. It was their agreement that the First Respondent will pay the Appellant within 30 days from the date of submission of such invoices, alternatively within reasonable time of the submission of the invoices.
- (11) It was however a further term of the agreement that the First Respondent was only liable to pay Appellant, once the Department had paid the First

³ Vol 4, pp 148 and 150 and Vol 4 pp 169

Respondent. Therefore, payment of the Appellant was conditional on the Department paying the First Respondent.

- (12) The Appellant performed as required by the agreement. Invoices for work done for period 2011 to 2015, were submitted to the First Respondent from time to time for payment. The amount due and payable to the Appellant for invoices submitted amounted to R15 114 267.25. By the 28 July 2015, First Respondent had only effected payment in the amount of R8 648 287.00 to the Appellant, with the shortfall of R6 456 958.00 forming the subject of the claim before the court a quo. Several attempts were made by the Appellant to get an explanation from the Respondent as to the balance due to her, but the Respondents ignored her. When no explanation was forthcoming from the First Respondent but the action was defended, the Appellant instituted summary judgement application. The Respondent's defence then raised was that the Department had not made payments due to queries raised with regard to the Appellant's drawings. The matter was therefore subsequently placed on the trial roll.

RESPONDENTS' VERSION ON THE PLEADINGS:

- (13) The Respondents do not dispute the amounts claimed by the Appellant in total, nor the balance owed and due to the Appellant. The Respondents raised several defences to the Appellant's claim. During the summary judgement application the Respondents' defence was that

the Department had not paid the Appellant's invoices, due to the queries with regard to the Appellant's drawings.

- (14) The main defence pleaded by the Respondents remained that the Department of Health had not paid the First Respondent for invoices submitted to it. The Appellant made two applications for further particulars in order to get an explanation as to why the Department allegedly had not paid. In his reply to these requests, the Second Respondent stated "that the Department did not respond why they don't pay the Appellant's invoices". The Respondents did not provide a answer to the crucial question, which also formed the basis of their defence.

COMMON CAUSE:

- (15) On the proper reading of the record, the following appears to be common cause⁴:

- (a) That the First Respondent would effect payment of the Appellant's invoices within 30 days from the receipt of any such invoices, alternatively within a reasonable time upon receipt of any such invoices, but subject thereto that First Respondent would only be liable to make payment of the Appellant's invoices submitted to it,

⁴ Vol 2, pp 138-139 Plea: parag 7:2

upon the Department of Health making payment to the First Respondent.

- (b) In the event that First Respondent was not paid by the Department of Health, the First Respondent was not liable to pay the Appellant for any invoices.
- (c) It must follow that, should the Department not pay timeously- the payment period might not only be extended, but liability may completely be avoided in the event of total non-payment.
- (d) This tacit agreement between the Appellant and Second Respondent was further canvassed during cross-examination by both legal representatives, and confirmed as a true reflection of their agreement.

FINDINGS OF THE COURT A QUO:

- (16) The *court a quo* dismissed the Appellant's claim on the basis that the Appellant failed to prove on a balance of probabilities the following:-
 - 1. The tacit terms on which Appellant's claim is predicated.
 - 2. That the North-West Department of Health has made payments to the First Respondent in respect of the invoices she had submitted to the Respondents.

3. That the money paid to the First Respondent's bank account, was meant for the invoices she submitted.
4. That the conduct of the Second Respondent was conduct envisaged⁵ in the provisions of Sec 64 of the Close Corporation Act⁶, rendering him personally liable.

ISSUES TO BE DECIDED:

- (17) On appeal this court is called upon to determine the correctness of the findings of the court *a quo* and in effect to decide on the evidence presented the following:
- (a) Whether Appellant had discharged the onus on her showing that the First Respondent had received payment from the Department of Health.
 - (b) Whether Second Respondent should be held personally liable in respect of the debts of the First Respondent.

EVALUTION OF EVIDENCE:

- (18) Due to the fact that both the Appellant and the First Respondent presented similar evidence it must be accepted as common cause that

⁵ Vol 26 – Judgment parag 97

⁶ Close Corporation Act 69 of 1984

there was a tacit agreement between the parties with regard to the payment period and liability as set out in paragraph 15 above.

- (19) The effect of this agreement is that the payment of the Appellant was conditional on the Department paying the First Respondent. The First Respondent's main defence to the Appellant's claim, is that the Department did not pay him and therefore not liable to the Appellant. Put differently, the condition on which payment must be done, has not eventuated or been fulfilled. The Appellant therefore, bears the onus to show on the balance of probabilities, that the Department had effected payment to First Respondent in respect of monies claimed by it in respect of services rendered by the Appellant, as covered by the Appellant's invoices.
- (20) As to which of the professional's invoices were submitted by the Respondents for payment; how much was claimed from the Department; and when the claims were paid were matters falling within the knowledge of the Respondents and the Department. The professionals on the projects were not privy to such information. The appellant was not in a position to verify whether the Respondents had submitted invoices to the Department or had received payment in respect of their invoices⁷.
- (21) It is on record that the First Respondent did not follow the back-to-back invoicing but "progress invoicing" when claiming from the Department.

⁷ Vol 6 pp 201-202

There was no proper correlation of the Appellant's invoices with those of the consolidated invoices submitted to the Department with regard to dates and amounts claimed and paid. The Appellant did not know how the Respondent calculated the amount claimed. This information was also exclusively within the knowledge of the Respondent. The Appellant was reliant on the *bona fides* of the First Respondent that she will be paid for architectural services rendered, when the Respondents received payment from the Department. Only the Respondent knew as to how much and when did the Department made payment. The Appellant was supposed to submit only the invoices of architectural services rendered for payment to the Respondent.

- (22) To succeed in her claim, the Appellant has to prove that the Respondent was paid by the Department of Health; and how much was paid in response of Architect fees. Any request for such information from the Respondent was ignored. None of this information was disclosed during the exchange of pleadings. The Second Respondent gave different reasons why the money was not paid.
- (23) The Second Respondent was evasive and disingenuous with regard to the question whether he was paid the architect's fees. The Second Respondent failed to answer this question several times during the exchange of pleadings. The following extracts from the pleadings serve as examples:-

- (24) In her first request for further particulars, the Appellant put the following question to Respondents⁸:

“Is it the Defendants’ case that the First Defendant did not receive payment from NWDOH in respect of any of the invoices forming the subject of the Plaintiff’s claim?”.

Defendants’ response:

“The First Defendant has made demanded for outstanding fees for the Department of Health North-West Province”⁹.

- (25) The Appellant in her second request for further particulars raised the following query amongst others¹⁰:-

“Specify, in respect of each such invoices, whether the Province gave any indication as to the acceptability or not of the invoices, or any reason for the alleged non-payment of such invoices by the Province”¹¹.

Defendant’s response:

⁸ Vol 2, pp153 – First Request for further particulars

⁹ Vol 2, pp163 – Respondent’s response to further particulars

¹⁰ Vol 2, pp161 – Second Request for further particulars

¹¹ Vol 2, pp167 – Appellant’s Second request for particulars

“In some instances the Department demanded attendance registers and in certain circumstances there has been no response from the Department¹²”.

- (26) The abovementioned extracts from the pleadings indicate that the Respondents were not prepared to provide information with regard to payments done for architectural services rendered. As a result, it became difficult for the Appellant to prove issues that have a direct bearing on the facts that are in dispute between the parties, which issues or facts fall particularly within the knowledge of the Respondents.
- (27) In order to meet this difficulty, the Appellant tendered the evidence of three witnesses in support of her claim. Ms Zoe Scholtz, an auditor, analysed the consolidated invoices submitted by the Respondents to the Department and paid by it. She compared the consolidated invoice and what was paid by the Department into the First Respondent's bank account. Ms Scholtz's report indicates that the First Respondent invoiced and was paid the amount of R47 862 231.91 in total for a period from November 2011 until December 2014. Out of the said amount, R15 114 267.25 was for architects fees. Both Mr Mosimanyane and Mr Kamunyu who are employed by the Department as Director Finance and Director Infrastructure respectively corroborated Ms Scholtz's report. The salient feature of their evidence is that not only had the invoices that First Respondent had submitted and been paid for included architects

¹² Vol 2, pp175-176 – Respondent's Response

fees, but that all the architects fees claimed from the Department were paid in full.

- (28) Mr Kamunyu's evidence was to the effect that the consolidated invoice indicates who and how much each professional should be paid. The First Respondent did not claim in the abstract, but what it claimed was based on the invoices submitted to it by respective professionals. The Department believed that First Respondent will in turn pay these professionals whose particulars appeared on the consolidated invoice. Put differently, if the architect fees are included in the consolidated invoice, the Department will pay the architect fees to the First Respondent, but those fees are meant for the architect.
- (29) The evidence of these three witnesses clearly demonstrated the procedures followed by the First Respondent to claim from the Department. Their evidence establish beyond any balance of probabilities that the architects fees included in the consolidated invoices submitted by the First Respondent, had been paid in full by the Department. The Second Respondent conceded under cross-examination the following:
- (1) That he received the invoices from the architect and that he did not pay such invoices.

- (2) That invoices contained in Ms Scholtz's report (A3) each included an amount raised in respect of architect fees, and these have been paid by the Department.
- (30) The Second Respondent's admission under cross-examination negates the Respondents' defence that the First Respondent was not paid by the Department. In my view, the question whether the Department had paid the appellant's invoices had been settled by the concessions made by the Second Respondent.
- (31) The Second Respondent was not only defiant but also evasive in answering the question as to whom those fees in respect of architects' fees included in the First Respondent's invoices relate to, if not the Appellant, seeing that she was the only architect on those projects. The Second Respondent's view that what he claimed and for who he claimed is a matter between him and the Department and has nothing to do with the Appellant, is a transparent attempt at evasion of liability. This attempt at evasion is clearly captured from answers given during the trial.
- (32) Q: Mr Nalane: *"Mr Mboya, you have also heard from the evidence of Ms Tondolo that she was shocked to hear that you had been paid so much money and that you claim over and above what she had charged? What is your response to that?"*

A: Mr Mboya: *"What I claim from the Department, it does not mean I must pay it to her because I have got a different arrangement with the Department and she has got a different arrangement with MJ Mboya".*

He further proceeded and state:-

"The Architect is a sub-contract to me, so what I claim from me, what is due to them. So it has got nothing to do with the invoices that the Architect has claimed".

- (33) The Second Respondent's answers not only evaded the question asked, but also creates an impression that he possess a discretion as to who to pay or not. His view was the fact that he had claimed for architect fees did not mean that those fees are meant for the Appellant, or that the Respondents were obliged to pay those fees to her. This view does not constitute a defence. The *court a quo* seems to have agreed or endorsed this clearly erroneous view in its judgement when it said as one of the grounds whereby it dismissed the Appellant's claim:-

"That the Appellant failed to prove that the money paid to the First Respondent bank account was for invoices she submitted for her".

- (34) The Second Respondent's bold statement that the Department had not paid him was not substantiated either during pleadings, nor the trial. The evidence of Ms Scholtz; Mr Mosimanyane and Mr Kamunyu were not contradicted. The Respondents conceded that they had claimed and had been paid for architects fees. The Second Respondent's evidence shows that he attempted to jump from one defence to another, in an attempt to explain why the fees had not been paid to appellant. With

regard to the Respondent's, different defences, even the *court a quo* said, "*it leaves doubt in the mind of the court whether the First Defendant's defences are genuine*¹³".

- (35) The court a quo also found that the Second Respondent's evidence was unsatisfactory with regard to the reasons for failing or refusing or neglecting to pay Appellant's fees¹⁴. The Appellant needed only to prove on the balance of probabilities that the First Respondent had claimed and had been paid the architect fees. In my view the Appellant had succeeded in proving that the First Respondent had been paid the fees due to the Appellant by the Department in full.
- (36) The evidence clearly established that the First Respondent had claimed for architectural fees for the period November 2011 to December 2014 and was paid R15 114 267 .28 in respect thereof. The court a quo had accepted that evidence.
- (37) Nothing much need be said about the defence that the Appellant's drawings were queried by the Department. These drawings were discovered by the Appellant. The Respondents could not point out any queries that caused the Department not to pay, nor produce any correspondence from the Department to that effect.

¹³ Vol 26 Judgment parag 89-90

¹⁴ Vol 26 Judgment parag 88, pp45

- (38) In addition to the fact that these “defences” were only raised during cross-examination, Ms Van der Vyver and Mr Nel gave plausible evidence which disproved those defences.
- (39) Taking into account that the Respondents failed to give an explanation as to whom the architect fees that the First Respondent had included in its invoices to the Department relate, if not the appellant, leads one to the inevitable conclusion that the Second Respondent’s version in his evidence, which had not been pleaded, namely that those fees might have been in respect of some other architect, is nothing but another attempted at evading liability. This version should be rejected

UNPAID INVOICES:

- (40) There was a further aspect which apparently concerned the Court a quo. This related to two unpaid invoices of the First Respondent. The Appellant sought to prove her claim by tendering the evidence of Ms Scholtz, Mr Mosimanyane and Mr Kamunyu. They corroborated each other with regard to the fact that all architects fees, claimed by the Appellant had been paid by the Department. The *court a quo* rejected the evidence of Ms Scholtz and Mr Mosimanyane as unreliable. This rejection was based on the evidence of Mr Kamunyu, who testified that two invoices submitted by First Respondent were not paid. The court found that the failure by Ms Scholtz and Mr Mosimanyane to mention those two invoices, render their evidence unreliable, with regards to their

evidence that all invoices had been paid. Therefore the court a quo found that the Appellant had failed to prove her claim¹⁵.

(41) I am of the view that the *court a quo* failed to properly consider the relevance to be attached to the two invoices that were not paid. My view is informed by the following facts:

- (a) The evidence of Ms Scholtz and Mr Mosimanyane, was based on all the invoices that were claimed and paid in full (A3 bundle) and which relate to the Appellant's claim.
- (b) The two unpaid invoices did not form part of the basis of the Appellant's claim, neither did the Second Respondent testify that those two invoices were part of the invoices submitted for payment.
- (c) Furthermore, the said unpaid invoices did not include any architects fees, but related to a disbursement claim of the First Respondent.
- (d) The Respondent did not make any discovery in respect of the two invoices, and lastly.
- (e) The two unpaid invoices were not even submitted for payment at the time when this action commenced. The evidence on record is that they were re-submitted in September 2017.

¹⁵ Vol 26 Judgment para 88 pp45

- (42) The evidence of the witnesses was in respect of invoices submitted and paid by the Department for the period October 2011 up until December 2014. Reference by the witnesses to all invoices, in the context of payment, must be confined, firstly to the said period and secondly, to invoices which included architectural services rendered during that period. With due deference to the court *a quo*, any interpretation to cover invoices that were not claimed at the commencement of the action, and which did not include architect fees, is misplaced. I am further of the view that the *court a quo* disregarded the irrelevance of the two invoices in the determination of the facts placed before it.
- (43) The two unpaid invoices therefore did not help the Respondents' case nor should they have impacted negatively upon the veracity of the testimonials of Ms Scholtz or Mr Mosimanyane. As a result, I find no plausible reason to reject the evidence of the said witnesses as being in contradiction with that of Mr Kamunyu. Insofar as these two invoices formed part of the reasons for the dismissal of the Appellant's claim, this was clearly done in error.
- (44) The Appellant's claim in respect of the personal liability of Mr Mboya (Second Respondent) is based on the abuse of the corporate juristic personality of Mboya CC (First Respondent), thus attracting personal liability in terms of Section 64 alternatively Section 65¹⁶. The general rule is that when a corporation is registered an individual entity separate

¹⁶ Close Corporation Act 69 of 1984

from that of its shareholders is created. This enables the corporation to function under its own name, as a juristic person. Put differently, "*All human beings are persons but not all persons are human beings*". A company as a juristic person can sue and be sued in its capacity as juristic person. The company does not only have rights, but also duty to pay its creditors, hence limitation of liability of those directors behind the company.

- (45) Any director or member who recklessly conducts the affairs of a corporate entity run the risk of attracting personal liability. The court looks at the substance of things rather than mere legal form, in deciding the personal liability of director or members. Courts will not allow the entity to be used to justify wrong conduct, protect fraud or defend crime.
- (46) Ms Scholtz identified 310 transactions in the First Respondent's bank account statements with "debit card purchases" as descriptions. Her analyses of the bank statement reveal that the Second Respondent a sole member of the corporation, used the close corporation's funds for his own benefit. An amount of R5 527 280.81 was used for amongst others, paying for his own residence; children school fees and personal clothing.
- (47) The Second Respondent holds the view that he can do as he pleases with the corporation's funds. His evidence indicates that the close corporation was an extension of himself. In holding this view, he does not recognise any distinction between himself and the close corporation. The following extracts from the record of proceedings bears testimony

to this view: “..... so whether he buys liquor or he pays the gym, it is up to Mr Mboya to decide how he spend HIS money.” He further admits that he made payment for his private residence in the amount of some R4 million.

(48) The Second Respondent knew at all material times that the close corporation owes creditors, specifically the appellant. He recklessly spent the corporation’s funds for his personal benefit. His conduct amounted to a sheer disregard of the debts of the corporation, and its separate juristic personality.

(49) Henochsberg on the Companies Act¹⁷, describe such conduct as follows: -

“That the carrying on of the business of a company recklessly mean “carrying it on by conduct which evince a lack of any genuine concern for its prosperity.” A fortiori if one deliberately depletes the company’s assets, or misuses its corporate form for one’s own purposes, then that conduct will fall within the ambit of Sec 424”.

(50) The same principle was formulated with regard to Close Corporations in the form of Section 64¹⁸. This principle was quoted with approval in the case of **Ebrahim v Airport Cold Storage**¹⁹ - where **Cameron J** stated:

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¹⁷ Companies Act 71 of 2008 Vol 1 (Durban: Lexus Nexis 2011)

¹⁸ Close Corporation Act 69 of 1984

¹⁹ 2008 (6) SA 585 (SCA) at par (14)

"..... The section retracts the fundamental attributes of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept of incompetent and becomes needlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do they risk being made personally liable".

The court a quo's finding that the Second Respondent *"was therefore at large to use, the money in Mboya CC's bank accounts at his pleasure"*²⁰ is in contrast with the well-established principle of company and close corporation legislation and cannot be endorsed.

- (51) The Second Respondent was well aware that an amount of R48 million was paid to the First Respondent's account by the Department and that ±R15 million of that amount was claimed on behalf of the appellant. Further he was aware that the First Respondent owed the Appellant an amount of ± R7 million. The Second Respondent recklessly used the said money for purposes totally unconnected with the business or the corporation.

CONCLUSION:

²⁰ Vol 26 Judgment parag 96

- (52) In conclusion, I find that the *court a quo* erred in dismissing the Appellant's claim in respect of all the invoices that were paid in full with regard to architects fees and that the Second Respondent is personally jointly and severally with the First Respondent liable for payment of the amounts due.

As a result, I suggest the following order: -

- (1) The Appeal is upheld with costs against the Respondents, jointly and severally, including the costs of the application for leave to appeal;
- (2) The order of the court a quo is replaced with the following:
 1. "Mboya CC is ordered to make payment to the plaintiff in the amount of R6 456 958.00 (Six Million, Four Hundred and Fifty Six Thousand, Nine Hundred and Fifty Eight Rands), together with the interest thereon from the date of demand.
 2. Mr Mboya is declared to be personally liable to the Appellant in respect of Mboya CC's aforesaid debts, jointly and severally therewith.
 3. The Defendants are ordered to pay the costs of the action".



B.P. MANYATHI

ACTING JUDGE OF THE HIGH COURT

I agree:



C. SARDIWALLA

JUDGE OF THE HIGH COURT

I agree and it is so ordered:



N. DAVIS

JUDGE OF THE HIGH COURT

DATE HEARD: 04 November 2021

JUDGMENT DELIVERED: ...12... May 2022

APPEARANCES

FOR THE APPELLANT: ADV I JOUBERT SC

INSTRUCTED BY: ROELF NEL INC, PRETORIA

FOR THE RESPONENT: NO APPEARANCE