IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 15633/2010

In the matter between:

MMA ARCHITECTS CC Applicant

and

LUYANDA MPAHLWA First Respondent

LUYANDA MPAHLWA DESIGNSPACEAFRICA (PROPRIETARY) LIMITED Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED Third Respondent

Judgment handed down on 8 June 2011

S Olivier AJ

1. This is an urgent application, launched on 15 July 2010, first set down for hearing on 17 August 2010, which came before me on 5 May 2011, for what was contended[1] to be interim relief, pending the determination of an action to be instituted. The third respondent played no role in the application before

[1] There was a debate at the bar as to the exact classification of the nature of the relief

me and no further reference to it is made herein. The relief sought, in broad summary, was as follows:

(a) that the first respondent be removed as a signatory to the banking accounts in Cape Town of the applicant;

(b) that both the respondents be interdicted and restrained from:

(i) competing with the business of the applicant; or trading in any business which is similar to the business of the applicant;

(ii) withdrawing funds from the applicant's Cape Town banking accounts;

(iii) utilising the VAT registration number of the applicant; or

(iv) withdrawing funds from the second respondent's bank account.

(c) a *mandamus* that the applicant be furnished with:

(i) copies of all tax invoices issued on behalf of the applicant by the respondents bearing its VAT registration number;

(ii) copies of all VAT returns issued on behalf of the applicant by the respondents bearing the applicant's VAT registration number;

(iii) copies of all VAT returns issued on behalf of the second respondent;

(iv) copies of all tax invoices issued on behalf of the second respondent.

(d) that the respondents pay the costs of the application on the attorney and client scale.

2. The background to the dispute between the parties is as follows.

3. During 1995 Mr Mphethi Malunga Morojele set up practice as an architect under the name *"Mphethi Morojele Architects"*. The practice flourished.

4. Mr Morojele and the first respondent, Mr Luyanda Mpahlwa – the latter is similarly a qualified architect – have been professionally associated with one another since 1997. At the time Mr Mpahlwa was in exile in Germany where he had been living for fifteen years. He was practising as an architect in Germany and during 1997 he sought an association or partnership with architects based in South Africa. The two agreed to join forces and they became involved in the construction of the South African embassy in Berlin. In 1998 they established MMA Architects CC, the present applicant.

5. The parties subsequently set up the Cape Town branch of MMA Architects. As Mr Morojele himself states, it was always envisaged that Mr Mpahlwa would operate MMA Architects' Cape Town branch and he has, in fact, done so for the last ten years.

6. Mr Morojele does not claim to have made any direct contribution to the growth of the practice in Cape Town, nor does Mr Mpahlwa claim any contribution to the growth of the practice in Johannesburg. It is not in dispute that they very rarely had any joint management meetings, much to the dissatisfaction of Mr Mpahlwa. The Cape Town practice grew and represented proportionally more of the income of MMA Architects. Mr Mpahlwa became increasingly dissatisfied with the fact that he was only a 24% member of MMA Architects, whereas the branch he was running as at 2008 was generating more than 70% of MMA Architects' revenue. As from 2006 Mr Mpahlwa made various proposals to restructure their business.

7. Only the third of the available options found favour with all parties – this was to split MMA Architects, with the Cape Town office being severed entirely from the business of MMA Architects. It was agreed that Mr Mpahlwa would cease to be a member of MMA Architects and would take over the Cape Town office as a going concern. It is, in essence, the status of this agreement which lies at the heart of the dispute between the parties. Mr Mpahlwa contends that by September 2008 it was agreed, after much discussion, that he would acquire the Cape Town branch, would transfer his 24% member's interest in MMA Architects to the other members, and that he would pay a purchase price which comprised a *"cash"* and settlement of his existing loan account.

8. MMA Architects, in essence, do not dispute the existence of this agreement. On MMA Architects' version an agreement was entered into on 9 February 2009 that it would repurchase Mr Mpahlwa's 24% interest in MMA Architects

by no later than 28 February 2009. On 22 May 2008 a valuation of Mr Mpahlwa's 24% interest was determined in the amount of R4 349 955, whilst the value of the Cape Town branch was determined at R8 488 000. After the declaration of a dividend (R2 million) and the payment of a bonus (R1 million), and setting all amounts due off, the one against the other, an amount of R1 138 045 would fall due and become payable by Mr Mpahlwa to MMA Architects on 30 April 2009. In addition thereto Mr Mpahlwa would settle his loan account of some R867 584.

9. MMA Architects contend that further deliberations resulted in the heads of agreement between the parties never being signed. It contends that *"the transaction was never completed*".

10. MMA Architect's case is firmly predicated upon Mr Mpahlwa's membership of MMA Architects. MMA Architects contends that Mr Mpahlwa is acting in breach of his fiduciary duties owed to MMA Architects by operating the business of the second respondent. The stance adopted by MMA Architects is reflected in Mr Morojele's affidavit where he states that: *"It is clear that the first respondent is in flagrant breach of his fiduciary duties to the applicant, and that he has elected to implement the agreement between the parties without being prepared to pay a consideration for same as initially agreed."*

11. The argument advanced by Ms Clarke, who appeared on behalf of MMA Architects, was that members in a close corporation stand in a close relationship to each other and that they owe their fiduciary duties to the

close corporation. She relied upon section 42 of the Close Corporations Act, 69 of 1984, as amended, the relevant provisions of which are as follows:

> *"42. Fiduciary position of members*
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> *(1) Each member of a corporation shall stand in a fiduciary relationship to the corporation ...*
>
> *(2) Without prejudice to the generality of the expression 'fiduciary relationship', the provisions of subsection (1) imply that a member –*
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> *(a) shall in relation to the Corporation Act honestly and in good faith, and in particular –*
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> *(i) shall exercise such powers as he may have to manage or represent the corporation in the interest and for the benefit of the corporation;*
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> *...*
>
> *(b) shall avoid any material conflict between his own interests and those of the corporation, and in particular –*
>
> *(i) shall not derive any personal economic benefit ... where the benefit is obtained in conflict with the interests of the corporation;*
>
> *(ii) ...*
>
> *(iii) shall not compete in any way with the corporation in its business activities ...*
>
> ....

> *(4) Except as regards his duty referred to in subsection (2)(a)(i), any particular conduct of a member shall not constitute a breach of a duty arising from his fiduciary relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts."*

12. Unlike a company, where the distinction between the shareholder – who owes no fiduciary duty to the company – and the director – who is responsible for the control and management of the company, and who owes, at common law, a fiduciary obligation to the company – the concept of membership in a close corporation has conflated the concepts of directorship and membership.

13. In *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) Heher summarised the position in South African law as regards to fiduciary obligations as follows

> *[30] The principles which govern the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law. The Roman and Roman-Dutch law provided equivalent relief. In Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 19 - 20 and 34 - 5 the sources were considered and the conclusion was expressed that the extension and refinement of the Civil Law by English courts was a development of sound doctrine suited to 'modern conditions'. The fullest exposition in our law remains that of Innes CJ in Robinson v Randfontein Estates Gold Mining Co*

Ltd (*supra*[2] at 177 - 80). It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.

> *Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros (1 Macq 461 at 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. . . .*
> *Whether a fiduciary relationship is established will depend upon the circumstances of each case. . . . But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.'*

The principles so stated remain true, not only for this country, but also in many Commonwealth (and United States) jurisdictions.

[31] The following short summary attempts to encapsulate the present level of development. The rule is a strict one which allows little room for exceptions.[3] It extends not only to actual conflicts of

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[2] 1921 AD 168

[3] Citing *Regal (Hastings) Ltd v Gulliver and Others [1967] 2 AC 134 (HL) at 154F - 155E ([1942] 1 All ER 378 at 392G - 393C); Canadian Aero Service v O'Malley (1974) 40 DLR (3d) 371 (SCC) at 382; Peffers NO and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1965 (2) SA 53 (C) at 56D - 57G*

interest but also to those which are a real sensible possibility.[4] *The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.*[5] *Because the fiduciary who acquires for himself is deemed to have acquired for the trust,*[6] *once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage;*[7] *(2) the trust could not itself have made use of the information, opportunity etc*[8] *or probably would not have done so;*[9] *(3) the trust, although it could have used the information, opportunity etc has refused it or would do so;*[10] *(4) there is not privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance;*[11] *(5) it was no part of the fiduciary's duty to obtain the benefit for the trust;*[12] *or (6) the fiduciary acted honestly and reasonably;*[13] *(although English and Australian Courts make some allowance for equity in calculating the scope of the disgorgement in such cases). The duty may extend beyond the term of the employment.*[14]

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[4] Citing *Aberdeen Railway Co v Blaikie Bros (supra); G E Smith Ltd v Smith; Smith v Solnik [1952] NZLR 470; Boardman v Phipps [1966] 3 All ER 721 (HL) at 737I, 743F - I, 748E - F, 756I; Canadian Aero Service v O'Malley (supra at 384, 385)*

[5] Citing *Robinson v Randfontein Estates GM Co Ltd (supra, loc cit); Regal (Hastings) v Gulliver (supra at 392C); Boardman v Phipps (supra at 737D, 744H, 747D); Warman International Ltd and Another v Dwyer and Others [1994 - 5] 182 CLR 544 (HC of A) at 559*

[6] Citing *Palmer's case supra at 20*

[7] Citing *Regal (Hastings) v Gulliver (supra at 386B, 392F); Re Reading's Petition of Right [1949] 2 All ER 68 (CA) at 70E - F, 71A; Soulos v Korkontzilas [1997] 2 SCR 217 (SCC)*

[8] Citing *Regal (Hastings) v Gulliver (supra at 378); Reading v Attorney-General [1951] 1 All ER 617 (HL) at 619H; Boardman v Phipps (supra at 746I); Industrial Development Consultants Ltd v Cooley [1972] 2 All ER 162 (Assizes) at 175f - j; Warman International v Dwyer (supra at 557 - 8); Bhullar and Others v Bhullar and Another [2003] EWCA Civ 424 at para 41*

[9] *Furs Ltd v Tomkies et al [1936] 54 CLR 583 (HC of A) cited in Canadian Aero Service v O'Malley (supra at 385); Boardman v Phipps (supra at 747A - D)*

[10] Citing *Warman International v Dwyer (supra at 558); Industrial Development Consultants Ltd v Cooley (supra)*

[11] Citing *Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339 at 367*

[12] *Regal (Hastings) v Gulliver (supra at 378, 386B); Jones v East Rand Extension Gold Mining Co Ltd 1903 TH 325*

[13] Citing *Regal (Hastings) v Gulliver (supra at 386A, 392D); Boardman v Phipps (supra at 744D, 745C - D*

[14] Citing *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C) at 820I and the cases there cited*

[32] The approach enunciated by Lord Upjohn in Boardman v Phipps (supra[15] at 758) commends itself as a practical way of dealing with cases of this nature:

> *'1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal.*
> *2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed on the agent, to see what is the scope and ambit of the duties charged on him.*
> *3. Having defined the scope of those duties one must see whether he has committed some breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.*
> *4. Finally, having established accountability, it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.'*
> *(See also Industrial Development Consultants v Cooley (supra[16] at 173c - f).)'*

[33] The principles which I have summarised are consistent with the doctrine enunciated in Robinson's case supra[17] and necessary for its effective operation and should be approved by this Court;"

14. In Ultraframe (UK) Ltd v Fielding[18] Lewison J considered that the general duties of directors included "*two strands of fiduciary duties*", which were the "*no conflict rule*"[19] and "*no profit rule*".[20] The first duty precludes a director from entering into a transaction where the director has an interest, which conflicts with that of the company, and the second requires a director to account for in any profit that he makes from his position unless there has

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[15] Footnote 4 above
[16] Footnote 8 above
[17] Footnote 2 above
[18] [2005] EWHC 1638 (Ch)
[19] at paragraph 1307 *et seq*
[20] paragraph 1318 *et seq*

been consent. Lewison J pointed out that "*(t)he rule does not preclude a fiduciary from retaining a benefit or gain which comes his way as a result of his fiduciary position, if those to whom he owes fiduciary duties have given informed consent to the benefit or gain.*"[21] Perhaps a more felicitous way of formulating the no profit rule is that a director may not make "*an unauthorised profit*".[22]

15. In *Item Software (UK) Ltd v Fassihi*,[23] Arden LJ, in considering the question as to whether or not there director had a fiduciary obligation to disclose to the company his breach of duty (which duty she held existed) in the course of her judgement, quoted from an American text in setting out what she considered to be the nature of the fiduciary obligation of directors:

> *[42] Professor of Robert C. Clark has described the fundamental nature of the duty of loyalty in these terms:*[24]
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> *"The most general formulation of corporate law's attempted solution to the problem of managerial accountability is the fiduciary duty of loyalty: the corporation's directors ... owe a duty of undivided loyalty to their corporations, and they may not so use corporate assets or deal with the corporation, as to benefit themselves at the expense of the corporation and its shareholders. The overwhelming majority of particular rules, doctrines, and cases in corporate law are simply an explication of this duty or of the procedural rules and institutional arrangements involved in implementing it. The history of corporate law is largely the history of the development of operational content for the duty of loyalty. Even many cases that appear to be about dull formalities or rules of the road in fact involve disputes arising out of alleged managerial disloyalty ... Most importantly, this general fiduciary duty of loyalty is a residual concept that can include factual*

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[21] at paragraph 1318
[22] at paragraph 1322
[23] [2005] 2 BCLC 91
[24] See Corporate Law (1986) pp 34 and 141; emphasis in the original

situation is that no one has foreseen and categorised. The general duty permits, and in fact has led to, a continuous evolution in corporate law.'

16. The *"duty of loyalty"* is now seen as the litmus test for the existence of fiduciary duties.[25] As Millet J pointed out in Bristol and West Building Society v Mothew[26] a person is *"not subject to fiduciary obligations, because he is a fiduciary; it is because he is subject to them that he is a fiduciary"*.[27] Thus *de facto* directors are subject to fiduciary duties not because they undertake to promote the interests of the company, but because they have put themselves in a position where they owe the company a duty of loyalty - their duties are imposed and not assumed by undertaking to promote the interests of the company.

17. In a similar vein Heher JA in *Phillips*[28] approved of the following dictum by La Forest in Hodgkinson v Simms Phillips[29]

'It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.'

18. As Lewison J points out in Ultraframe, the no conflict rule ceases to operate as a regards a director's future activities when he seizes to hold office.[30] He

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[25] see Bristol and West Building Society v Mothew [1998] Ch. 1 at 18; Item Software Ltd v Fassihi *supra* footnote 23 at 104
[26] *supra*, footnote 25
[27] *ibid* at 18
[28] At 482A-B
[29] [1994] 2 SCR 377 (SCC)
[30] at paragraph 1309

also considered, citing *In Plus Group Ltd v Pyke*[31], that the same rule applies where a director "*in fact has no powers to exercise even during the currency of his directorship*"[32] something which would occur where a director is effectively excluded from office. The facts there were as follows: Mr Pyke was a director of In Plus. However, he had fallen out with his co-director and had been effectively excluded from the management of the company. While still a director, he set up his company with a major customer of In Plus. In so doing, he used no property belonging to In Plus and made use of no confidential information which had come to him as a director of In Plus. In those circumstances, the Court of Appeal held that he was not in breach of his fiduciary duties to In Plus, even though he remained a *de jure* director of it. Sedley LJ said:

> *"Quite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts (explicable and even justifiable though they may have been) of his sole fellow director and fellow shareholder Mr Plank. Accepting as I do that the claimants' relationship with Constructive was consistent with successful poaching on Mr Pyke's part, the critical fact is that it was done in a situation in which the dual role which is the necessary predicate of [the claimants'] case is absent. The defendant's role as a director of the claimants was throughout the relevant period entirely nominal, not in the sense in which a non-executive director's position might (probably wrongly) be called nominal but in the concrete sense that he was entirely excluded from all decision-making*

[31] [2002] 2 BCLC 201
[32] at paragraph 1310

and all participation in the claimant company's affairs. For all the influence he had, he might as well have resigned." [33]

19. It should, however, always be remembered that a director cannot abdicate his responsibilities or abandoned his status without formally resigning. Accordingly, it must be only in the most exceptional circumstances that a director can avoid the no conflict rule by pleading impotence when it is his duty to act in the interests of the company and avoid the conflict. The same would no doubt apply to a member of a close corporation.

20. It seems to me that where section 42 imposes fiduciary obligations upon a member, such obligation must be given content in the context of the facts and taking into account the principles set out above. Context, after all, is everything. In *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd*[34] Nugent JA quoted with approval the remark made by Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Daly*,[35] *'context is everything'*. Nugent JA continued:

> *"And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification.'*

21. Mr Mpahlwa contended that he is only a member in name; that he had renounced and relinquished his member's interest with the full knowledge and consent of the other members, and with that knowledge and consent

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[33] at par 90
[34] 2003 (1) SA 155 (SCA) ([2002] 4 All SA 138) at para 1
[35] [2001] 3 All ER 433 (HL) at 447a

took over the Cape Town branch, including its clients. He pointed out, with reference to various annexures to his answering affidavit, that MMA Architects and Mr Morojele no longer viewed him as a member of MMA Architects and, moreover, that they were also of the view that he had successfully acquired the Cape Town branch.

22. Mr Acton, who appeared for the first and second respondents, pointed to the following facts, namely that:

(a) the professional indemnity insurance associated with the Cape Town branch had been cancelled by Mr Morojele;

(b) the obligation to pay the staff of the Cape Town branch had been transferred, again at the instance of Mr Morojele, to the first and second respondents;

(c) Mr Mpahlwa was precluded from taking decisions pertaining to the management of MMA Architects;

(d) He was not receiving any dividends as a member of MMA Architects;

(e) In summary, that all the material steps were taken by the first and second respondents to take over the Cape Town branch, which steps were taken with the knowledge and, by implication, the consent of MMA Architects.

23. Finally, Mr Acton submitted that Mr Mpahlwa continues to run the Cape Town business, has not done any damage thereto, and is keeping a full and up to date accounting record.

24. Mr Acton submitted that, accordingly, it is clear that all parties had given effect to the resignation of Mr Mpahlwa as a member of MMA Architects, to the renunciation by him of his member's interest in MMA Architects, and to the transfer of ownership of the Cape Town branch as a going concern from MMA Architects to the second respondent.

25. The real dispute between the parties, so he submitted, was the question of the settlement of the purchase consideration to be paid by Mr Mpahlwa. This dispute is a dispute to be resolved by way of a trial action. There, if I understand it correctly, the major bone of contention would be whether or not the Cape Town banking accounts, which reflected substantial balances in favour of MMA Architects, did or did not form part of the sale.

26. The factual disputes in regard thereto cannot be resolved on the papers before me. Mr Acton submitted that, insofar as final relief has been sought in various respects I am to apply the well known rule enunciated in *Plascon Evans*.[36] The interim aspects of the relief sought, of course, have to be adjudicated on the basis as whether MMA Architects had made out a *prima facie* case, whether there is a well grounded and reasonable apprehension of harm; whether the balance of convenience favours the granting of interim

[36] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

relief; and whether MMA Architects is possessed of an effective alternative remedy.[37]

27. I am not convinced that MMA Architects has made out a *prima facie* case for a breach of fiduciary obligations, particularly where, on either party's version, it seems to me that Mr Morojele had throughout conducted himself and MMA Architects on the basis that Mr Mpahlwa would take over the Cape Town branch and had acted accordingly. In those circumstances it would seem to me that there may very well not have been a breach of any fiduciary obligation. This, however, is a matter best left for the trial court to decide in due course.

28. To the extent that MMA Architects has submitted that the relief is entirely of an interim nature, the discretion is linked to the balance of convenience and the notion of prejudice and to the strength of the right made out.[38] It seems to me that MMA Architects has an alternative remedy available to it. It seems to me that the balance of convenience favours the respondent; that the case made out is not very strong and, in the exercise of my discretion, I would, accordingly, refuse the application.

29. In summary, even if a case had been made out, I would, in the exercise of an overriding discretion,[39] refuse the relief.

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[37] See for instance *Fedsure Life Assurance v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003 (3) SA 268 (W)
[38] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H-362B; *Van der Westhuizen and Others v Butler and Others* 2009 (6) SA 174 (C) at 189A
[39] *Knox D'Arcy*, *supra*, at 362A

30. There was, finally, a debate regarding the wasted costs occasioned by the postponement of the application on 22 March 2011. It seems to me that there is no blame to be apportioned for the matter not being heard on that date and, in the circumstances these costs should be costs in the cause.

31. In the premises I make the following order:

The application is dismissed with costs.

Sven Olivier AJ