Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 3863/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 2 February 2016

Judgment delivered: 5 February 2016

In the matter between:

SUNROCK LIMITED	Applicant
And	
ALAN LOUIS	First Respondent
ALAN LOUIS N.O.	Second Respondent
BRIAN LOUIS N.O.	Third Respondent
LOUIS JACOBUS CLOETE N.O.	Fourth Respondent

(Second to fourth respondents cited in their capacities as trustees of the Louis Group International Foundation ([IT…….])

JUDGMENT

BINNS-WARD J:

[1] The applicant has applied for orders enforcing a settlement agreement and permitting the realisation of the security that was furnished for its performance. The applicant and all

four of the respondents were parties to the settlement agreement, which was concluded in England. The first respondent was cited in his personal capacity and also, as second respondent, in his capacity as one of the three trustees of a trust called the Louis Group International Foundation. His two co-trustees, who were cited in that capacity, are the third and fourth respondents.

[2] The agreement was concluded with the object of settling litigation between the applicant and the first respondent in the High Court of England and Wales for the repayment of a loan extended by the former to the latter. The agreement provided for the execution of a deed of suretyship by the second to fourth respondents in their capacity as trustees in respect of the obligations thereunder of the first respondent and the registration of a mortgage bond in favour of the applicant over an immovable property in the Western Cape that is registered in the name of the trust.

[3] The settlement agreement was subject to certain conditions precedent, which, according to the terms of the contract, were required to have been fulfilled within stipulated time periods. It is common ground that not all of the conditions were timeously fulfilled. The parties concluded addendum agreements providing for extended periods for the fulfilment of the conditions. Notwithstanding that certain of the conditions still remained unfulfilled after the expiry of the expressly extended periods, the parties proceeded to implement the agreement by making and receiving certain payments in accordance with its provisions and by providing the contemplated security in respect of the payment of the balance.

[4] The respondents have raised a number of grounds of opposition to the application. The first is that this court has no jurisdiction in respect of the claim against the first respondent, who says that he resides in England. The second is that the settlement agreement had lapsed due to the non-fulfilment within the periods stipulated of the suspensive conditions to which it was subject. It was also alleged that fulfilment of the suspensive condition that required approval of the transaction by the South African Reserve Bank had not been proven. A fourth ground is that the agreement qualified as a ‘credit agreement’ that is subject to the National Credit Act 34 of 2005 and falls, by virtue of s 89 thereof, to be treated as void in the absence of proof that the applicant was registered in terms of the Act as a credit provider.

[5] As to the first of aforementioned grounds of opposition, the founding affidavit cited the first respondent in the following terms:

> 4. The first respondent is **ALAN LOUIS**, an adult businessman who conducts business, *inter alia*, as a trustee of a registered trust known as Louis Group International Foundation and registered under number [IT……] (hereinafter referred to as "the Trust") with its address at Louis Group Building, 2 Boundary Road, Century City, Cape Town, Western Cape. In terms of the settlement agreement on which this application is based, the first respondent chose his *domicilium citandi et executandi* at Welcombe Manor, Warwick Road, Stratford upon Avon, United Kingdom.

[6] The papers were purportedly served on the first respondent at the Louis Group building at Century City, Cape Town, on 11 March 2015. The fourth respondent accepted the papers. The Sheriff's return of service reflects service as having been effected at the first respondent's '*place of employment…at the given address, the first respondent being temporarily absent*'. Service of the papers was also effected by a UK process server on the first respondent in England, also on 11 March 2015. Paragraph 1 of the process server's affidavit of service states:

> On the ELEVENTH day of March, 2015 I attended the home of the First Respondent in this matter and provided a certified copy of the notice of motion and founding affidavit to the First Respondent.

[7] In response to the first respondent's allegation that he is resident in the United Kingdom and not in the Western Cape, the applicant put in in reply copies of various Windeed reports showing that the first respondent is a director of a number of South African companies in respect of which the records of the Companies and Intellectual Property Commission ('CIPC') appear to reflect his residential address as either [S……], The [P……..], [A……] Road, [B…….] [B……], Cape Town, or more recently as [2…] [C…..] Avenue, [C…..] [B…], Cape Town.

[8] The applicant contends on the basis of the latter information that there is no genuine dispute of fact concerning the first respondent's residence in Cape Town. I am unable to accept that contention.

[9] The fact that the first respondent is a co-trustee of a South African registered trust and a director of a number of local companies does not in itself connote that he is resident here. Similarly, the fact that the CIPC records reflect that he has a residential address in Cape Town does not establish as a matter of fact that he resides at the given address. The recorded information may be incorrect or out of date. That that is not a fanciful possibility is

borne out by the content of the UK process server's affidavit quoted earlier. It would suggest that the first respondent's home is somewhere in England. It bears reiteration in that connection that the *domicilium citandi et executandi* chosen by the first respondent in terms of the agreement in issue in the case is also in England. I appreciate that the choice of a *domilicium citandi* does not equate to a declaration of residence at the chosen address, but it is a contextual factor that lends verisimilitude to the first respondent's evidence that he lives in England. The inherent probability is that he would choose an address where notice of any matter that might be germane would come most efficiently to his attention.

[10] The reported cases confirm that it is not always easy to define the concept of residence. It is well established, however, that it is not the same thing as domicile and also that a person may have multiple places of residence. Whether a particular place qualifies as someone's place of residence entails a factual determination. There is no factual evidence before this court as to the nature and extent of the first respondent's current connection with either of the two addresses that the applicant has averred in reply might be his place of residence in this court's area of jurisdiction.

[11] In any event, in matters in which a defendant or respondent has multiple places of residence, including a place within the area of the court's territorial jurisdiction, the court will exercise jurisdiction on the basis of that party's status as a resident if service is effected on him at his residence within the court's jurisdiction; in other words, if he is actually residing within the jurisdiction when the proceedings against him are instituted; cf *Ex parte Minister of Native Affairs* 1941 AD 53, at 58 *fin*-59, and *Mayne v Main* 2001 (2) SA 1239 (SCA), at para 3(3). The UK process server's affidavit suggests that in the current matter the first respondent was at a place of residence outside the country when the proceedings were instituted.

[12] In the circumstances, applying, as I must, the principles expressed in *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634-635, I am impelled to accept that the first respondent did not reside here when proceedings were instituted and that this court therefore lacks jurisdiction to determine the application against him in his personal capacity.

[13] The settlement agreement and the deed of suretyship provided by the second to fourth respondents both contain clauses in terms of which the respondents have consented to the jurisdiction of what is now the South Gauteng Division of the High Court. It seems to

me that the applicant, which is a company registered in the Isle of Man, has instituted proceedings against the first respondent in this Division probably because of the security for the debt founded in the mortgaged property situate in the Western Cape. If the application against the first respondent were to be determined in the applicant's favour in the South Gauteng Division there would not be a jurisdictional difficulty with that Division's ability to make an order of direct exigibility against the mortgaged property situate within the area of this Division's territorial jurisdiction; see *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town* 2005 (6) SA 96 (C), at para 39-53. These proceedings might have been amenable in the circumstances to transfer to the South Gauteng Division in terms of s 27 of the Superior Courts Act 10 of 2013. I raised that possibility with counsel during argument, but the applicant chose not to seek to make the application that would be necessary for such a transfer to be ordered.[1]

[14] It follows that the application against the first respondent will have to be dismissed for want of jurisdiction.

[15] The second to fourth respondents in their capacity as trustees of the Louis Group International Foundation undertook joint and several liability with the first respondent by executing a deed of suretyship in favour of the applicant in which they bound the trust as surety for and co-principal debtor with the first respondent in respect of the latter's obligations under the settlement agreement. In the result, provided that the existence of the principal obligation is established and is legally valid, the applicant is able to enforce the claim directly against the second to fourth respondents independently of the first respondent.[2]

[16] It is not disputed on the papers that the trust has a substantial asset within the territorial jurisdiction of the court in the form of the mortgaged property. The respondents' counsel did not dispute that this court has jurisdiction in respect of the trust. I think he was correct in not doing so. It seems established that a court will exercise jurisdiction over a trust where the trust property is located within its area of jurisdiction or where the trust is

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[1] I might mention in this connection that the judgment in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) upon which the applicant relied in its heads of argument does not appear to me to be pertinent. There is no scope to infer a consent by the first respondent to the jurisdiction of this court. He did consent to the jurisdiction of a South African court, but it was to jurisdiction of the South Gauteng Court.

[2] See e.g. Forsyth & Pretorius, *Caney's Law of Suretyship* 6th ed at 56-7 and LAWSA 2nd ed (replacement volume 2010) vol 5 part 1 at para 423(a). Clause 5.4 of the settlement agreement also expressly provided as much.

administered within that area; see Cameron et al, *Honoré's South African Law of Trusts* 5 ed at 646-659. The location of the trust property, not the places of residence of the trustees, is the determining criterion.

[17] It is necessary then to consider the other grounds upon which the respondents have disputed liability.

[18] As mentioned, the suspensive conditions were not all fulfilled within the periods stipulated in the settlement agreement. The first respondent, with whom the other respondents appear to associate themselves in opposing the application, has questioned whether one of the conditions, namely the obtaining of approval from the South African Reserve Bank, has been satisfied at all. The condition was recorded in clause 4.1.2 of the settlement agreement. In terms of clause 4.5, the parties bound themselves to co-operate and work together in submitting the necessary application to the Reserve Bank. Questioning whether the condition had been fulfilled was a curious position to have for the respondents to have adopted. In the first addendum to the agreement subscribed to by the first respondent in his personal capacity and on behalf of the trust on 11 March 2014 it was recorded that the approval of the Reserve Bank was still being sought. In the second addendum, similarly subscribed to on 28 July 2014, it was recorded that the parties had agreed to record 'that the approval of SARB, as required for the registration of a first mortgage bond over the Property in terms of clause 4.1.2 of the Main Agreement and clause 4.5 of the Main Agreement, has been obtained'.

[19] If regard is had to the provisions of the settlement agreement it seems plain that the reason why Reserve Bank approval was required was to ensure that the security to be furnished would be efficacious in the event of a default in payments under the contract by the first respondent. The terms of the recordal in the second addendum confirm as much. The correspondence between Nedbank Limited (apparently representing the first respondent and the trust) and the Reserve Bank attached to the applicant's replying papers makes it clear that the Reserve Bank 'approved the granting of a suretyship bond up to the value of the overseas debt'. It appears therefrom that the approval was granted in principle orally at a meeting held on 26 March 2014 and confirmed in writing to Nedbank by the Financial Surveillance Department of the Reserve Bank on 18 May 2014.

[20] The next question to consider is whether the belated fulfilment of the suspensive conditions resulted in the agreement lapsing, as contended by the respondents. It is trite that

if the suspensive conditions to which an agreement is subject are not fulfilled within the stipulated time, or timeously waived, the agreement lapses. The applicant has contended, however, that the parties tacitly 'revived' the agreement. That that may competently occur is well established; see e.g. *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) at 466B and following. In my judgment the applicant's contention must for all practical purposes be upheld. It does not matter whether the 'revival' was tacitly or expressly effected. In my view there is much to be said for an argument that the settlement agreement was expressly reinstated and varied in terms of the second addendum agreement. Whatever the position, for the reasons that follow, I consider it to have been effectively reinstated, subject to certain variations.

[21] It is common cause that the signature of the deed of surety, which was the first of the stipulated suspensive conditions, occurred timeously. The second addendum executed by the parties, which has been described in relevant detail above, clearly denotes that the obtaining of Reserve Bank approval, albeit outside the period stipulated in the original agreement, was regarded by them as effective for the purpose of the transaction. The second addendum moreover provided (in clauses 5-9[3]) for both the recordal of part performance of the original agreement by the first respondent and for a variation of the main agreement in respect of (a) the payment provisions and (b) the withdrawal of proceedings in England and the lifting of the associated freezing order in force there once the mortgage bond had been registered. The second addendum did not state a time within which the registration of the mortgage bond had to occur, but it was clearly intended to be within a reasonable time and probably before 1 November 2014, by when the first respondent was in terms of the varied

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[3] Clauses 5-9 of the second addendum provided:

'5. Sunrock acknowledges receipt of payment from AL for the sum of £14 500 as contemplated in clause 8.3 of the Main Agreement.

6. The parties agree that, in terms of clause 5.2 of the Main Agreement, AL shall pay the sum of £160,000 on or before 1 November, 2014 which will then constitute full payment of the twenty equal instalments of £10,000 since monthly payments from 1 Dec 2013 to 31 March 2014 were paid by AL. No default notices are recorded in terms of Clause 5.3 of the Main Agreement.

7. Once the mortgage bond as contemplated in the Main Agreement has been registered, and thereafter only upon AL's written request, Sunrock will:-

   7.1 withdraw the legal proceedings without conditions as contemplated in clause 5.7.1 of the Main Agreement;

   7.2 release the freezing order without conditions as contemplated in clause 5.7.2 of the Main Agreement;

   7.3 write to such parties as AL may reasonably require confirming that the freezing order has been removed.

8. Save for the amendments contained herein the Main Agreement shall remain binding on the parties.

9. This addendum constitutes the entire agreement between the parties regarding the amendment to the Main Agreement.'

payment provisions required to pay an amount of £160 000. The mortgage bond was in fact registered on 4 September 2014.

[22] It is clear that to the extent that the original agreement had lapsed due to non-fulfilment of two of the suspensive conditions, the second addendum operated to confirm its reinstatement and variation by agreement between the parties. The parties' express agreement in the second addendum that the 'Main Agreement' would remain binding upon them amounted upon a proper construction of that document to a tacit waiver in the reinstated agreement of the time stipulations for the fulfilment of the suspensive conditions expressly stipulated in the original agreement. Indeed, it would be impossible to give business efficacy to the agreement recorded in the second addendum if the time stipulations in clause 4.6 of the reinstated original agreement were not to be treated as *pro non scripto*.

[23] I turn now to consider whether the agreement is a credit agreement that is subject to the National Credit Act. The agreement was concluded in England and the principal obligations to which it gave rise fell to be performed in Britain. The first respondent was required to make payment to the applicant in sterling into a bank account conducted in the Isle of Man. What required to be done in South Africa was that a mortgage bond had to be registered in favour of the applicant over the trust's immovable property. The purpose was to afford security for the performance of the suretyship obligations undertaken by the trust in terms of the deed of surety executed in England. As described above, it is evident that it was to this aspect of the contractual arrangement that the required approval by the South African Reserve Bank was directed.

[24] The settlement agreement was thus a composite agreement. The respondent's counsel contended that its provisions provided for a credit transaction within the meaning of s 8(4)(f) of the Act because it provided for a scheme of deferred payment of an amount owed. I am not satisfied that this is correct because it does not provide for a charge, fee or interest in respect of the agreement or the amount that had been deferred. It did provide that in the event of a default within the meaning of clause 5.3 of the settlement agreement, the total debt in terms of the loan that was the subject of the pending litigation in England would become immediately payable inclusive of the interest payable thereunder, which would fall to be calculated as if the settlement agreement had not been concluded. In my view it is the loan agreement that would qualify as a credit transaction as defined in s 8(4)(f) of the Act, and not the settlement agreement. Be that as it may, the applicant's counsel was willing to accept that the settlement agreement qualified as a credit transaction and, without so finding,

I shall proceed for present purposes on that assumption. It was a composite agreement in that it also made provision, as integral part of its terms, for the conclusion of by the trust an associated credit guarantee agreement in the form of a deed of surety and the provision of a surety bond.

[25] It is well established that a credit guarantee agreement qualifies as a credit agreement for the purposes of the National Credit Act in terms of s 8(5) only if it relates to an obligation undertaken by a 'consumer' in terms of a credit facility or a credit transaction to which the Act applies. See s 8(5) of the Act and cf. *Nedbank Ltd v Wizard Holdings (Pty) Ltd and others* 2010 (5) SA 523 (GSJ), at para. 9-10; *Structured Mezzanine Investments (Pty) Ltd v Davids and others* 2010 (6) SA 622 (WCC), at para. 16, and *Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd* 2012 (3) SA 371 (KZP), at para 16. The second to fourth respondents are being sued on the basis of the obligation undertaken in terms of the credit guarantee. The National Credit Act can be of application only if the credit transaction to which it relates - for current purposes, the credit transaction component of the settlement agreement - is subject to the Act

[26] Section 4(1) of the Act provides that the Act '*applies to every credit agreement* [defined in s 1 to mean 'an agreement that meets all the criteria set out in section 8'] *between parties dealing at arms length and made within, or having an effect within, the Republic, except*….'. It is not disputed that the credit transaction feature of the settlement agreement was entered into between parties dealing at arms length. It was *not* made within the Republic. The only question then is does it, or did it, have an effect within the Republic? The respondents' counsel relied on the provision of security by means of mortgaging immovable property in South Africa and the application for Reserve Bank approval as the matters that resulted in the contract having an effect within the Republic. But, as I have sought to explain, those effects concerned only the credit guarantee related aspect of the settlement agreement, not the credit transaction aspect to which the guarantee pertains. The deferred payment structure of the settlement agreement has no effect within South Africa at all.

[27] The expression '*having an effect in*', considered in isolation and without due regard to the context, is vague and potentially of extremely wide import. Basic principles of statutory interpretation require, however, that its meaning within s 4(1) of the Act be determined with regard to its context. Context in the relevant sense includes its place in the language of the provision in which it appears and, more widely, the apparent scope and

objects of the statutory instrument concerned. The latter consideration is expressly reiterated in s 2(1) of the Act, which prescribes that '*This Act must be interpreted in a manner that gives effect to purposes set out in s 3.*' Section 3 of the Act sets out the purposes of the Act. It is essentially an expanded rehearsal of the long title of the Act.

[28] The introductory wording of s 4(1), which provides the immediate context of the expression, states that the Act applies, subject to the stated exceptions, to every credit agreement made within the Republic. The addition of the qualification 'or having an effect within' the Republic appears to me to be directed at bringing within the ambit of the Act credit agreements that are concluded extra-territorially, but which fall to be carried out materially as if they had been concluded within the Republic. Various examples come readily to mind: an instalment sale agreement concluded in Namibia in terms of which the goods concerned are to be supplied to, used by and paid for the consumer in South Africa; a deed of surety executed in the United Kingdom in terms of which a local resident undertakes an accessory obligation in favour of the credit provider in respect of another type of credit agreement to which the Act is applicable. Notwithstanding that the agreements in the given examples were concluded outside the country, their material effect within the country in each example is indistinguishable for practical purposes from that of like agreements between the same or equivalent parties concluded within the country. The objects of the Act would be liable to being easily subverted if the exclusion from the Act of credit agreements concluded outside the country were not to be qualified. It is to that consideration that the '*having an effect in*' seems to me to be directed. The relevant 'effect' within the meaning of the expression in s 4(1) must, in my view, be one that would be relevant with regard to the purposes of the Act.

[29] Section 3 of the Act provides:

> **Purpose of Act**
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> The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
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> (b) ensuring consistent treatment of different credit products and different credit providers;
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> (c) promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[30] The credit transaction in the current matter was entered into outside the country between a foreign company and a person resident in the United Kingdom. It took place completely outside the South African credit market and nothing about it has been shown to have any bearing on accessibility to credit by South Africans or the nature of credit products available within South Africa. Why should a party providing credit in that context be regulated by South African legislation and required to register as a credit provider here in order to advance credit? When considered in the light of s 3 of the National Credit Act, I cannot identify any incident of the credit transaction component of the settlement agreement that had a relevant effect within South Africa. The incidence of security being furnished for payment of the debt by a South African property owning trust cannot be a basis for regarding the Act as applicable to the credit transaction on the ground of the credit agreement having an effect here because, as mentioned, s 8(5) of the Act itself, excludes the application of the statute to credit guarantees in respect of credit transactions to which the Act does not apply. The other argument by the respondents' counsel that the agreement had an effect within the Republic because of the consent by the parties to the non-exclusive jurisdiction of the South

Gauteng Division of the High Court is also without merit. Accepting that the consent to jurisdiction notionally could give rise to an effect within the Republic, it would not be of a nature that would in any way be relevant for the purposes of the Act.

[31] Insofar as the trust is concerned, it in any event qualifies as a 'juristic person' as defined in s 1 of the Act. This is so because it has three trustees. It is evident from the apparent value of the property it has furnished as security in the transaction, which it purchased for R18 million in 2007 and in the same year mortgaged to a third party for R16 million, that it is possessed of assets exceeding the threshold value determined by the Minister of Trade and Industry in terms of s 7(1)(a); viz. R1 million. In the circumstances, by reason of s 4(1)(a) of the Act, which provides that the Act does not apply to credit agreements in which the consumer is a juristic person whose asset value exceeds the threshold value determined by the Minster in terms of s 7(1), the credit guarantee contemplated by the settlement agreement does not in any event fall within the reach of the statute.

[32] It follows, in the absence of any substantive defence to the claim, that the applicant is entitled to judgment in its favour in terms of paragraphs 1, 2 and 3 of the notice of motion.

[33] The following orders are made:

1. The application against the first respondent is dismissed with costs on the grounds of this court's lack of jurisdiction to adjudicate the claim against him.
2. The second, third and fourth respondents, in their capacities as the trustees of the Louis Group International Foundation (IT 1548/2006), are directed to pay the following amounts to the applicant:
    2.1 £1 906 359 (one million nine hundred and six thousand three hundred and fifty nine pounds sterling) converted to South African Rand on the date of payment;
    2.2 Interest on the amount of £1 906 359 (one million nine hundred and six thousand three hundred and fifty nine pounds sterling) at the rate of 9,5% per annum from 1 December 2014 to date of payment, converted to South African Rand on the date of payment
3. The Remainder Portion 1 of the Farm Brakke Fontein No. 32 in the City of Cape Town, Cape Division, Western Cape Province registered in the name of the trustees for the time being of Louis Group International Foundation (IT 1548/2006) in terms

of deed of transfer number T40947/2007 is hereby declared specially executable in respect of the judgment debt in terms of paragraph 2 of this order.

4. The second, third and fourth respondents, in their capacities as the trustees of the Louis Group International Foundation (IT 1548/2006), shall be liable to pay the applicant's costs in the application on the scale as between attorney and client (as provided in terms of clause 5.6 of the settlement agreement read with clause 7.7. of the deed of suretyship).

A.G. BINNS-WARD
Judge of the High Court