IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 16727/13

In the *ex parte* application of:

PETRUS JACOBUS PRETORIUS Applicant

INTERVENING PARTY: JACQUELINE STELLA FRANKLIN

Date of hearing: 13 February 2017

Date of judgment: 23 February 2017

JUDGMENT

SAVAGE J:

Introduction

[1] In this application, brought *ex parte* on 21 October 2013, the applicant, Mr Petrus Jacobus Pretorius, seeks an order that this Court declare him competent in terms of s 4A(2)(a) of the Wills Act 7 of 1953 to receive benefits bequeathed to him in the will of the late Mrs Lucretia Olivier ('the deceased') dated 24 October 2012 ('the will').

[2] Following the service of the application on the deceased's former attorneys, her sister, Ms Jacqueline Franklin, sought leave to intervene in the application before this Court. Although at the outset of the hearing the applicant took issue with Ms Franklin's *locus standi* and interest in the matter,

the objection was not persisted with and Ms Franklin was granted leave to intervene in the application. Apart from the fact that, as the sister of the deceased, the intervening party clearly had an interest in the matter by virtue of her blood relationship with the deceased, the matter had, in any event, since 2013 proceeded on the basis that Ms Franklin had already intervened in the matter, with a timetable for the filing of pleadings made an order of Court on 3 March 2014. In that order the applicant was granted until 4 March 2014 to indicate whether he sought the referral of any issues to oral evidence, a referral which was not sought and to which I shall return later.

[3] Without opposition, the late filing by the intervening party of her opposing papers was granted at the outset of the hearing.

Background

[4] The deceased died at the age of 79, some years after her husband and without offspring. In her last will, which the applicant and his daughter, Ms Sandra De Gouveia, signed as witnesses, the deceased nominated the applicant, failing which his daughter, as the executor of her estate. She also bequeathed to the applicant her immovable property situated at 103, 2nd Avenue, Parow, the household contents of such property and a Volkswagen beetle motor vehicle. In doing so, she recorded in her will that he "*has always been there for me and a helpful friend, seeing to my needs for the past 9 years*".

[5] Certain small bequests were made in the will, including R2000 to Ms Franklin; R2000 to two nieces; R1000 to a nephew; and small amounts to a few named charities. In addition, the will provided that R10 000 was to be held in trust for the deceased's mentally disabled sister, Veronica, who is institutionalised. It was directed that any monies left in the estate were to be dealt with by the executor "*as he sees fit*", including the residue of the funds held in trust for Veronica in the event that she was to pre-decease the testatrix.

[6] In a previous will executed on 20 April 1995 the deceased named her then attorney Mr Daroll Goldblatt as the executor of her will, with monetary bequests made to Ms Franklin (R10 000), Ms Franklin's husband

(R10 000), Ms Franklin's sons (a third each of R5000) and daughter (R5000); and the Parow Wesley Methodist Church (R5000). In addition, an amount of R50 000 was provided for Veronica, with the remainder bequeathed to five charities.

[7] Section 4A(1) of the Wills Act 7 of 1953 disqualifies any person who attests and signs a will as a witness at the time of execution of the will, and the spouse of such person at the time of execution, from receiving a benefit under the will. Notwithstanding this disqualification s 4A(2) provides that –

> '(a) *a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;*

[8] The applicant seeks an order in terms of s 4A(2)(a) that he be declared competent to receive a benefit from the will in spite of his signature of the will as a witness.

[9] It is not disputed that in the absence of such an order, s 4A(1) disqualifies the applicant from receiving a benefit under the will; and, although the applicant has since declined to act as executor of the deceased's estate, that in terms of s 4A(3) the nomination as an executor constituted a benefit under the will.

Applicant's case

[10] The applicant is not related to the deceased. He knew the deceased, who he called Aunty Val, from April 2003 as she lived 200 metres from his home and he would see her walking in the neighbourhood with her sister, Veronica, who lived with her at the time. He was a police man and the deceased sought his advice regarding a family dispute. Thereafter, over time he and the deceased became closer and when from 2007 she was no longer able to drive due to her failing eyesight, he took her shopping in his car, to visit friends and relatives, to visit Veronica, who was moved into care, to church and to her medical and hospital visits. He stated that he also

maintained the deceased's garden and home and in the last two years of her life, his wife did her washing and cooking and he took food and toiletries to Veronica. The applicant stated that he and his wife visited the deceased every morning as the years progressed, fed her cat, ensured she bathed regularly and that she had food every evening. The deceased got to know the applicant's daughter well, would often look after the applicant's grandchildren and they exchanged cards and gifts at Christmas and birthdays.

[11] The applicant described the deceased as a fiercely proud, private and independent woman who until 2011 was relatively healthy. He stated that he willingly assisted her as a friend "*as her family were not much in the picture at the time*". There were, according to the applicant, "*complications in her relationships with her immediate family*" with the deceased and Ms Franklin estranged and not on speaking terms for some years, until "*a thaw*" in their relationship at the beginning of 2013. In the applicant's opinion Ms Franklin and her husband, who live in the United Kingdom, "*were incredibly harsh and critical*" of the deceased, "*often making personal comments"* about her such as that she "*would not see out that winter*". The applicant considered this insensitive and stated that it left the deceased "*distraught"*. A disagreement also arose between the deceased and her sister concerned the lifestyle choices made by her sister's children, Colin and David, who live in Table View and the United Kingdom respectively, who had very little to do with the deceased. When the deceased's sister visited and stayed in Parow, according to the applicant, she did not see the deceased or have dealings with her.

[12] The applicant stated that he became the deceased's main care provider. He detailed occasions in which he had found the deceased with her arm broken and later with an injured toe and taken her to hospital for treatment. While hospitalised he stated that no family members visited her.

[13] In late 2010 or early 2011 the deceased informed the applicant that she wished to change her will and asked him to accompany her to Goldblatt's attorneys in Parow to do so as she had known Mr Goldblatt for many years. The applicant stated that the deceased made it clear to Mr Goldblatt that she wished to exclude her family from the will and leave the

bulk of her estate to the applicant. Mr Goldblatt asked to speak to the deceased alone and when the deceased exited his office she informed the applicant that they were to leave as Mr Goldblatt refused to change her will. The applicant stated that he was told by Mr Goldblatt that the deceased had instructed him to draft a will leaving a substantial benefit to him but that he had refused to do so as this would largely exclude her relatives from benefiting under the will. In addition, Mr Goldblatt raised the repayment of a R100 000 loan that the deceased had made to the applicant, apparently after he had experienced problems receiving his pension following his retirement from the SAPS in 2005 causing him regularly to be in arrears with his bond repayments. The applicant stated that he considered the loan and the drafting of the will to be separate issues and that he repaid the loan amount plus R2000 in interest in 2012 when he sold two motor vehicles.

[14] The applicant stated that the deceased was adamant that a change to her will was her wishes and that in late 2012 she approached him to request him to accompany her to the police station in order to attest to the execution of a new will. He stated that he was very busy and put this off a few times but that eventually she became "*most insistent*" and on 24 October 2012, with the deceased adamant that she did not want anyone else involved, they went to the SAPS in Parow to do so. In the presence of a police constable and the applicant's daughter the deceased signed a new will. The applicant stated that he was hesitant to sign the will and, not being legally trained, he was not aware that his signature as a witness may affect the validity of the will or the validity of any bequest to him. He stated that he was ignorant of the contents of the will and saw himself as a witness to a friend's will, with his friendship one based on mutual respect.

[15] The applicant's daughter confirmed her signature of the will as a witness, recording that to the best of her knowledge the applicant had not influenced or defrauded the deceased and that she was certain that the deceased wished for the applicant to receive the benefits she left to him. She confirmed the relationship between the deceased and her family, stating that she took over feeding their dogs and that she acted as a surrogate grandmother to her own children. She stated that for three years prior to 2013

Ms Franklin came to South Africa but did not contact the deceased due to a personal disagreement between the two and that, in February 2013, when she visited the two sisters had an argument. In addition, the deceased's nephew, David Franklin, who at the time lived a few houses from the deceased, would not acknowledge the deceased when she passed his house on her way to the applicant's house to feed his dogs and that had the applicant and his wife not been there for the deceased, she "*would have probably died long before due to neglect and loneliness. As it was, she was a major part of all of our lives and I was very glad and honoured to know her*".

[16] Ms De Gouveia stated that in 2012 the deceased approached the applicant to arrange for him to accompany her to the police station to attest to the execution of her new will. She was not certain who drafted the will but on 24 October 2012 they went to the SAPS in Parow where the will was signed and witnessed. Ms De Gouveia was not aware of the contents of the will and "*did not really read through it*" as it was not any of their business, the deceased was "*an immensely private person*" and she did not want to be seen to be prying into her affairs. The deceased was not in her presence coerced or forced to sign the will, which given their relationship "*would be totally unthinkable*" as she was a major part of their lives, they loved her as if she was their own flesh and blood and looked after her as one of their own family members.

[17] Mr Rafle Cloete, a minister at the Uniting Reformed Church in Parow, who lived opposite the deceased for 10 years confirmed on oath that the deceased referred to the applicant and his wife as "*special, caring friends*". He stated that the applicant would assist and care for the deceased, sometimes visiting her house more than once daily, at times late at night to check that she was well and bring her food. He would take out her rubbish, tend her garden, take her to the doctor and hospital, take care of her cat and her home and would drive her places in his own car. The applicant "*was really the one person that made a positive difference*" in the deceased's life and was by far the most involved and supportive of the people around her.

[18] Ms Anne Samuel, a friend of the deceased for the past six years, stated on oath that the deceased would often mention her relationship

with the applicant, who she viewed as a good friend and a guardian of the interests, with their relationship based on mutual concern and respect.

[19] Ms Edna Botha, a retired schoolteacher, knew the deceased and her parents since she was 10 years old. She lived next door to the deceased and has known the applicant for 10 years, since he moved into the neighbourhood. She stated on oath that she has personal knowledge of the positive role that the applicant played in the deceased's life, confirming the help he gave her over the last nine years and that the deceased spoke highly of the applicant and respected him as a true friend who had a direct and positive impact on her life. Ms Botha stated that the deceased and her sister were not fond of each other and when her sister stayed around the corner while visiting from the United Kingdom, she often did not visit her sister although she walked in the area with husband.

[20] Subsequently both Mr Cloete and Ms Botha filed affidavits in which they stated that they "withdrew" their first affidavits. Ms Botha stated that this was following further information she had received regarding the applicant's conduct of the matter.

Intervening party's opposition

Ex parte application

[21] Ms Franklin vigorously opposed this application. In doing so she took issue with the fact that the applicant had not explained the reasons for bringing the application on an *ex parte* basis. In argument it was stated for the applicant that it was not clear who should be given notice of the application given that Ms Franklin and other family members did not have a material interest in the outcome of the matter and for this reason the application was served on the deceased's former attorney, Mr Goldblatt.

[22] It was argued for Ms Franklin that the deceased's family members were clearly interested parties with a material interest in the matter; and that the applicant would have been aware, given disputes which had arisen between the parties following the death of the deceased regarding access to the deceased's property, that the application would be opposed. The applicant had failed, it was submitted, to approach the Court with the

utmost good faith and had been dishonest in various of the facts he put up in his founding affidavit. These included that he had retired from the SAPS when in a document put up by Ms Franklin it was evident that his had been a dishonourable discharge; his claims that he was the deceased's primary carer when this was false; his failure to indicate that his refusal to provide the deceased's family with access to her property had caused conflict between the parties; and his failure to provide full details of a loan he had been advanced by the deceased and a further loan which he had sought be advanced to him.

Failure to seek referral to oral evidence on disputed issues

[23] Ms Franklin also opposed the application on the basis that a number of disputes of fact had arisen on the papers and that on an application of the rule in *Plascon-Evans Paints v Van Riebeeck Paints,*[1] the relief sought could not be granted. These disputes included the circumstances under which the will was drafted; the circumstances surrounding the execution of the will; the nature and extent of the relationship between the applicant and the deceased; the existence of undue influence on the deceased in the execution of the will; and the mental capacity of the deceased at the time of the execution of the will.

[24] The applicant denied that relevant and material disputes of fact had been raised which were of such a nature as to justify a refusal to grant the relief sought, while acknowledging that the applicant had elected not to seek a referral of any issues to oral evidence in spite of an order of this Court having granted him the opportunity to do so.

Claim of undue influence

[25] Ms Franklin in her affidavit opposing the application agreed that the deceased was an independent person and stated that she was relatively healthy until 2011. She stated that the applicant overstated and exaggerated his relationship with the deceased, falsely contending that he was her main caregiver and that her family did not visit or have contact with her, when extended periods would elapse when the applicant did not see or visit her. It

[1] 1984 (3) SA 623 (A) at 634E-635D.

was, she said, a "*blatant lie*" that the deceased was estranged from her immediate family who have always been around, both in Cape Town permanently and through visits from the United Kingdom, and with other family members contacting her on a monthly basis. She cited examples such as her son attending to the deceased's needs during 2005 and 2006 and, more recently, her daily visits to the deceased in January and February 2013. Although she had been temporarily estranged from the deceased from 2006 to 2007, which she said was caused by the applicant's deliberate lie about a family member, she met the deceased on 27 December 2007 and resolved the matter when the deceased apologised for what she had written in a letter. Thereafter a normal cordial relationship with regular contact resumed, including letters, visits to the deceased's home and visits from family members while she was in hospital. Ms Franklin stated that it was her view that the applicant has deliberately exaggerated the extent of the rift with her sister to gain advantage and was "*particularly mischievous*" in relying on an alleged rift in 2013, which did not exist, after the will had been changed. Examples were given of comments made by the deceased's family, which were deliberately taken out of context by the applicant with the sole intention of upsetting the deceased. Further concern arose when, while in hospital, the deceased was heard by her nephew to refer to the applicant as "*Andries*", which was her late husband's name and which was "*another indication"* of the applicant's *"influence upon her*".

[26] Ms Franklin took issue with the applicant's claim that he undertook maintenance for the deceased stating that he removed her geyser more than three years earlier, telling her that it would explode, and did not replace it leaving her without hot water. It was disputed that the applicant kept the deceased's home maintained and that his wife did her washing. Her bedding, stated Ms Franklin, was always filthy and urine-stained, the condition of most furnishings was "*squalid, most horribly*", she lived without hot water and she wrote in correspondence to her family that she struggled with her own washing, describing her discomfort. She paid the applicant to do maintenance for her, describing in a letter that this was "*to keep the wolf from* [his] *door*". While the deceased continued driving until 2011 when she broke

her elbow in 2012, although her doctor declared her fit to drive again, she was convinced by the applicant that driving would damage her arm again and he "*took control of the car and disallowed her to ever drive again*". It was disputed that the applicant drove the deceased in his car, with Ms Franklin stating that it was "*definitely*" in her car. It was denied that the applicant took the deceased to visit Veronica every week or that he visited Veronica of his own accord. Also placed in dispute was the nature of the medical care given to the deceased by the applicant and his wife, with it contended that he failed to ensure during 2012 that she obtained professional medical treatment timeously and that this led to her losing a toe to amputation.

[27] Turning to the circumstances under which the will was executed, Ms Franklin stated that it was "*strange*" that although the applicant received a substantial benefit under the will he was unaware of both the circumstances in which the will was drafted and its contents in spite of his close contact with the applicant. This led Ms Franklin to be "*convinced*" that the will was drawn up by the applicant or someone close to him and that the deceased did not even read it before she was coerced into signing it "*on a day when she was so ill that she passed out there and her teeth fell out onto the floor in the police station*". Furthermore, had the deceased read the will she would not have misspelt the names of her two nieces; nor substantially reduced the amount bequeathed to Veronica given her deep concern for her sister. This led Ms Franklin to conclude that the deceased was unduly influenced by the applicant in the conclusion and signature of the will.

[28] Mr Darroll Goldblatt confirmed on oath that the deceased visited his office during 2012 with the applicant to instruct him to draft a new will. During the consultation she also sought that a loan agreement be prepared for a loan of R180 000 which she intended to make to the applicant and which was to be repaid when the applicant received his pension from the SAPS. Mr Goldblatt stated that he "*immediately realised that the deceased was not thinking rationally when she gave me the instructions and concluded that she was unduly influenced by the applicant."* He took the view that the applicant had manipulated her and he was therefore uncomfortable drafting a new will which would prejudice her sister, Veronica.

[29] Mr Dave Fidler, the Minister of the Parow Wesley Methodist Church until 13 December 2013, stated on oath that it became apparent to him that the deceased had a misplaced trust in the applicant, who exercised an undue influence over her, that she listened to no one but the applicant who "*systematically*" removed her from her friends and church support, convincing her that only he cared for her which was not true. This was aimed, in Mr Fidler's view, at having the applicant made the main beneficiary of the deceased's estate and to place him in control of it. This caused Mr Fidler to contact Ms Franklin to express his concerns.

[30] The deceased's niece, Ms Dawn Hewlett, who lives in the United Kingdom, confirmed on oath that for 40 years she corresponded up to 8 times a year with the deceased. From these letters it was apparent that her family assisted the deceased, with the applicant's involvement, it was stated, not being as regular as suggested by him.

[31] Mr David Franklin, the deceased's nephew who resides in the United Kingdom, stated that after he made use of the applicant's services to undertake some steelwork at a house he was renovating nearby but that the workmanship was of poor quality. A dispute ensued between them and in February 2006 the applicant told the deceased a deliberate lie that Mr Franklin had had an affair while he was doing his renovations. Mr Franklin stated that this was untrue but that it nevertheless caused conflict with his aunt.

[32] Ms Eleanor Furter started visiting the deceased at her house in 2012. She was shocked at the state of her living conditions. The deceased told her that she would be provided with a meal each day in return for her cooking dog food for the applicant's dogs. This seemed like a "*strange arrangement*" to Ms Furter. When the deceased's toe was amputated she told Ms Furter that the applicant could not visit her in hospital for various reasons, one of which was that he was going to watch rugby at someone's house and he was only seen at the hospital two or three times in the first week she was admitted. After her discharge from hospital the deceased told Ms Furter that she had left money on the table with her accounts for the applicant to pay but that the applicant had insisted there was no money with the accounts. The

deceased concluded that "*ghosts*" must have taken it and she provided more money for the payments. The deceased also told Ms Furter that the applicant was building a wheelchair for her and that she would have to pay money to him to get the wheels attached to the chair.

[33] On 20 July 2013 when Ms Furter visited, the deceased was ill, her face was swollen and she looked grey with blood in her nostrils, she could not lift up her arms and said that two ghosts had been chasing her around the house. The applicant showed her photographs of what the house looked like after the ghost had chased the deceased and before he had cleaned up. Ms Furter stated that the need for the pictures puzzled her, as did the applicant's conduct in showing these to her.

[34] Ms Joan Bay met the applicant in September 2003 when the deceased brought him to her house. The deceased told her that "*she felt sorry for* [the applicant] *and helped to pay towards his existing home bond*". In addition she told her that she sat in the applicant's vehicle whilst his case was going on against the SAPS at his door lock was faulty and she had to look after the car; that she was told by him that she could not drive her car after an operation to the her forearm as the arm will break when she drives a vehicle; and that she had to pay the applicant for petrol when he took her shopping with her own car. Whilst the deceased visited friends regularly, this was only until the applicant became involved with her during the last five years. She stated that the deceased's house was never cleaned.

[35] Mr Colin Franklin, the deceased's nephew, stated that he had been in regular contact with the deceased since emigrating from London in 1995. He had always got along with her "*just fine*" and was willing to render assistance to her in any form. He and his wife were told by the deceased in 2012 that she had changed her will and that she had collapsed at the police station when the will was signed. Mr Franklin stated further that he visited the deceased in hospital and that when he questioned her subsequent discharge from hospital she told him that this was because the food was terrible.

[36] After her death the applicant refused the family any access to the deceased's home and produced the will, claiming that it was

incontestable. He also claimed that there was no money in her bank account and the family paid the R8000 for her cremation, while the applicant was "*extremely rude to the family appointed undertaker*", demanding a death certificate and refusing to hand over her identity document.

Applicant's reply

[37] In his replying affidavit the applicant put up a copy of an unsigned handwritten will dated 22 October 2012 which he said he had found amongst the deceased's papers. He did not state how that will came to be drafted, nor why it had not been produced initially, nor did he explain the circumstances under which the subsequent signed will came to be typed. The applicant took issue with repeated allegations of an "*extremely provocative and argumentative nature*" made by Ms Franklin and disputed that there was any evidence to show that he had either defrauded or unduly influenced the deceased in the execution of the will. He stated that the deceased had nine months from date of signature of the will until her death to amend, destroy or revoke it, which she did not do. Furthermore, the benefits left in her 1995 will to family members were "*not much different to the latest will*" and that the deceased's wishes were for him to receive the benefit under the will. He questioned whether, if he had had ulterior motives, he would have signed the will as a witness and stated that he acted on a promise made to the deceased to protect her assets when he did not allow family members to remove items from her home.

Evaluation

[38] For the applicant to obtain the order sought, namely that he is competent to receive a benefit under the deceased's will in spite of his signature of the document as a witness, this Court must be satisfied in terms of s 4A(2)(a) that he "*did not defraud or unduly influence the testator in the execution of the will*".

[39] The intervening party places this pertinently in issue, contending that the applicant unduly influenced the deceased in the execution of the will.

[40] Motion proceedings, as was stated in *National Director of Public Prosecutions v Zuma*[2] -

> '*…unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent …, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*…'.

[41] It was made clear in *Wightman t/a JW Construction v Head Four (Pty) Ltd & another*[3] that –

> "(a) *real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him".*

[42] The intervening party disputes the facts surrounding the signature of the will by the deceased and puts up facts to support her contention that the deceased was unduly influenced in signing it. These include the nature and extent of the relationship between the deceased and the applicant; the applicant's role in the deceased's estrangement from individuals close to her; the nature and extent of the applicant's influence over her; the circumstances under which the will was prepared; and her mental and physical health on the day of its signature. These are not bald or hollow denials put up by the intervening party. The version put up by Ms Franklin

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[2] 2009 (2) SA 277 (SCA) at 290D.
[3] 2008 (3) SA 371 (SCA) at para 13.

does not constitute one which is on the face of it either fanciful and untenable. There is therefore no reason as to why this Court should approach the matter in the robust common-sense manner proposed in *Truth Verification Testing Centre CC v AE Truth Detection CC and others,*[4] with reference to the earlier decision in *Soffiantini v Mould.*[5]

[43] Unlike in *Blom and Another v Brown and Others,*[6] the facts of this matter do not suggest that it is a case in which there is no room for undue influence or that that "*nothing can be clearer than the absolute bona fides*" of the applicant. This is a deeply contested matter in which the factual disputes raised cannot be resolved in favour of the applicant on affidavit in motion proceedings.

[44] It is directly relevant that the applicant elected to proceed by way of application to this Court in circumstances in which he should have realised that his benefit under the will was to be contested and that a serious dispute of fact incapable of resolution was bound to develop on the papers.[7] At the very least, the breakdown in relations between the parties and the applicant's refusal to allow the deceased's family access to her property following her death would have made him aware of as much.

[45] The applicant did not seek the referral of the matter to oral evidence, even when the disputes of fact become patently clear to him after the opposing papers had been filed and he had been given an opportunity in the agreed court-ordered timetable to do so. Instead, he persisted with the course of action chosen, even to the extent of putting up in reply, without adequate explanation, a handwritten draft of the will, which had inexplicably not been previously disclosed.

[46] Additionally, the applicant's failure to make full disclosure of all relevant facts in his founding affidavit, including but not limited to disclosing the circumstances surrounding the preparation and signature of the will and the deceased's mental and physical state at the time of her signature of it,

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[4] 1998 (2) SA 689 (W) at 698H–J.
[5] 1956 (4) SA 150 (E).
[6] [2011] 3 All SA 223 (SCA) at para 23.
[7] *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at 154B-C.

when the application was launched *ex parte* and both good faith and full disclosure was required, justifies the dismissal of the application.[8] Given the fundamental disputes of facts on the papers and with the applicant having failed to make out a case for the relief claimed, the application falls to be dismissed.[9]

[47] For these reasons the application must fail. There is no reason as to why costs should not follow the result.

Order

[48] In the result, an order is made as follows:

1. The application is dismissed with costs.

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SAVAGE J

Appearances:

For applicant: Mr D de Mink of De Mink Posniak Attorneys

For Intervening party: Ms A de Wet

Instructed by Visagie Vos

[8] *Hassan v Berrange NO* 2012 (6) SA 329 (SCA) at 335G-H.
[9] *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (A) at 368C-D.