THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

In the matter between Case No: 6189/2019

THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**FIRST APPLICANT**
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS, FORESTRY AND FISHERIES	**SECOND APPLICANT**

and

B XULU & PARTNERS INCORPORATED	**FIRST RESPONDENT**
THE SHERIFF OF THE HIGH COURT FOR PRETORIA CENTRAL, MR T F SEBOKA NO	**SECOND RESPONDENT**
STANDARD BANK OF SOUTH AFRICA	**THIRD RESPONDENT**
FIRST NATIONAL BANK OF SOUTH AFRICA	**FOURTH RESPONDENT**
BARNABA XULU	**FIFTH RESPONDENT**

Coram: Rogers J

Heard: 3 September 2020

Delivered: 10 September 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] This is an application, by the abovenamed first and fifth respondents (BXI and Mr Xulu), for leave to appeal against my judgment and orders of 30 January 2020. The parties continue to be represented by the same counsel, save that Mr Bridgman appeared for BXI and Mr Xulu without the assistance of Ms Smart.

[2] Mr Xulu was joined as a fifth respondent in terms of my judgment of 30 January 2020. A rule nisi was issued calling on him to show cause why he should not be held jointly and severally liable with BXI for the repayment of the amount of R20,242,472,90 specified in para (e) of my order. Para (l) of my order provided that if Mr Xulu opposed the rule nisi, the court would on 12 March 2020 determine a timetable for the further conduct of the claim against him.

[3] Mr Xulu opposed the rule nisi. There were other developments. Shortly before the hearing on 12 March 2020, Ms Ndudane, to whom reference is made in the main judgment, applied for leave to intervene in the main proceedings with a view to seeking a reconsideration and setting aside of my judgment. Mr Xulu's affidavit in opposition to the rule nisi foreshadowed an application for my recusal. As at 12 March 2020 BXI had not delivered an application for leave to appeal, its legal representatives apparently being under the misapprehension that time would not run until the rule nisi was determined.

[4] As a result of these developments, I made an order by agreement regulating the further conduct of the application for leave to appeal, the intervention, the foreshadowed recusal application and the rule nisi. At that stage

there was, I believe, a general understanding that, subject to the outcome of the recusal application, I would deal with all the outstanding matters.

[5] Thereafter former Minister Zokwana delivered an application for the rescission of my judgment. BXI and Mr Xulu did likewise. It appears that the applications by Ms Ndudane for reconsideration, and the applications by former Minister Zokwana, BXI and Mr Xulu for rescission, were based primarily on an allegation that the applicants, more particularly Mr Mlengana, had knowingly caused false evidence to be placed before me and had knowingly suppressed relevant evidence. BXI and Mr Xulu also delivered a lengthy application for my recusal.

[6] Mr Xulu's affidavit in opposition to the rule nisi, and his affidavit in support of the recusal application, contained a strident attack on my competence, impartiality and integrity. In the circumstances, I took the view that I should not deal with the outstanding matters unless I was technically seized with them or unless they were formally allocated to me for hearing by the Judge President. After obtaining the parties' views, I reached the conclusion that the only outstanding matter with which I was technically seized was the application for leave to appeal. While considerations of convenience might have suggested that I should hear the other outstanding matters, there was no legal impediment to another judge dealing with them.

[7] I notified the Judge President accordingly. He decided that the outstanding matters (other than the application for leave to appeal) should be decided by a judge from outside this division. Smith J, from the Eastern Cape Division, was in due course seconded. I was told, at the hearing of the present application, that by agreement the rule nisi against Mr Xulu stood over for later determination, on the

basis that Smith J would first determine the intervention and rescission applications.

[8] Although BXI and Mr Xulu, pursuant to my order of 12 March 2020, delivered an application for leave to appeal, their application was made conditional on the failure of the intervention and rescission applications. On this basis, and for the time being, the application for leave to appeal was held in abeyance. Smith J delivered judgment on 1 September 2020. He dismissed the intervention and rescission applications with costs, including the costs of three counsel.

[9] After the matter was argued before Smith J but before he delivered judgment, the applicants in the main case requested that the present application for leave to appeal be heard in early September, Smith J having intimated that he would endeavour to deliver judgment by the end of August. The applicants anticipated that the losing party or parties in the proceedings before Smith J might seek leave to appeal his judgment. They considered that if leave to appeal were granted by both judges, it would be convenient in due course for the same appellate panel to consider both appeals, bearing in mind the overlapping issues and that about the first 2700 pages of the record before Smith J comprised the papers that were before me when I gave judgment on 30 January 2020. There would be an undue delay in bringing matters to finality if the conditional application for leave to appeal in the present case were only argued once all appellate processes in the matters before Smith J were exhausted.

[10] In respect of the present application for leave to appeal, BXI and Mr Xulu's attorneys are Millar & Reardon Attorneys of Durban ('MRA'), with Mr Bridgman as counsel. As to the recusal application, my understanding was that it had been rendered moot by the allocation of the outstanding matters to another

judge. However, and since there seemed to be some uncertainty on that score, I sought clarity from BXI and Mr Xulu's legal representatives. On 3 August 2020 MRA notified my registrar in writing that their clients did not seek my recusal in the application for leave to appeal. On 21 August 2020 Mr Bridgman submitted heads of argument in support of his clients' application for leave.

[11] It was thus much to my surprise that, just a few minutes before we entered court on 3 September 2020, my registrar received a letter from Mr Xulu stating that 'following extensive consultation', he and BXI submitted that 'the matter of recusal is paramount and must be decided before all other issues'. He stated that he had prepared a supplementary affidavit in the recusal application, which he would hand up. He sought leave to address me in court before the commencement of the application for leave to appeal.

[12] When the matter was called, I placed on record that my registrar had received this letter. I asked Mr Bridgman whether he was instructed to argue the recusal application. He said no. I asked him whether Mr Xulu had a right of appearance in the High Court. He took instructions and answered in the negative. I asked him to take instructions on whether, in connection with my recusal, Mr Xulu was relying on any new or recent facts, ie matters not ventilated in his earlier affidavits. He took instructions, and was given the supplementary affidavit which Mr Xulu had prepared. Since Mr Bridgman had not read it, I invited him to hand it to me instead. A cursory perusal satisfied me that the supplementary affidavit contained nothing new.

[13] I then addressed Mr Xulu. I told him that my judgment of 30 January 2020 had granted no substantive relief against him. I had merely ordered that he be joined. The rule nisi still had to be determined. I was thus of the view that there was no appealable order against him in his personal capacity. In relation to BXI,

he was not a legal practitioner with a right of appearance in the High Court. In terms of binding authority, such a person could not, save in exceptional circumstances, speak for a company in the High Court. (See *Manong & Associates (Pty) Ltd v Minister of Public Works & another* 2010(2) SA 167 (SCA) paras 3-16.)

[14] Mr Xulu did not seek to persuade me that in his personal capacity I had granted any final and appealable relief against him. He wished to address me on the substantive aspect of recusal. In relation to the application for leave to appeal, this was relevant only to BXI, not to him personally.

[15] Mr Xulu said that he could not afford to engage counsel to deal with the recusal application. I pointed out that Mr Bridgman was already on brief to appear before me that very day and that he could have been briefed to deal with the recusal application. Mr Xulu's answer suggested that Mr Bridgman and other members of the Cape Bar were or might be unwilling to argue the recusal application because they had to appear before me from time to time. I told Mr Xulu that Mr Bridgman was an experienced counsel who would not shrink from arguing a recusal application if it could properly be done. Mr Bridgman would know that no judge would harbour ill-feeling towards an advocate discharging his or her duty. I asked Mr Bridgman whether I was mistaken. He confirmed that I was not.

[16] I ruled that I would not hear Mr Xulu further in support of the recusal application. My reasons were briefly this. BXI and Mr Xulu's attorneys had unequivocally stated on 3 August 2020 that BXI and Mr Xulu did not seek my recusal from the application for leave to appeal. There had been no change of circumstances since then. Counsel on both sides had come to court ready to argue the application for leave to appeal. Because of MRA's letter of 3 August 2020, I

had not concerned myself with the recusal papers, which included opposing and replying affidavits which I had not read (the opposing papers were not even in the court file). If BXI and Mr Xulu were allowed to resurrect the recusal application, it would thus have entailed a postponement.

[17] In addition, there was no motivated application for a departure from the general rule that a representative without the right of appearance in the High Court may not appear on behalf of a company (cf *Manong* para 14). In my view, the observance of the general rule is of particular importance in matters of recusal, since there is a distinct danger that persons untrained in the professional and ethical standards of High Court litigation could misuse the occasion to vilify judges. In that regard, and with reference to Mr Xulu's lengthy affidavit in support of the earlier recusal application, I wish to say no more than that I would be surprised if any member of the bar would deign to associate himself or herself with many of the allegations contained therein or with the disrespectful language in which they are couched. The same is true of Mr Xulu's affidavit opposing the rule nisi to the extent that such affidavit foreshadowed recusal. (I must add that there is no indication that Mr Bridgman or Ms Smart was involved in settling the offending material.)

[18] I turn now to the application for leave to appeal. Given the attacks which Mr Xulu has made upon me, I would welcome the opportunity for an appellate court to assess the matter on appeal. However my personal preference is irrelevant. The question is whether an appeal would have reasonable prospects of success.

[19] The application for leave to appeal raises the following grounds:

(a) that I erred in finding the SLA invalid and in reviewing it and setting aside;

(b) that I should not have accepted Mr Mlengana's version that his signature on the SLA had been fraudulently obtained, given that such version was raised for the first time in reply, that it ran contrary to objective facts, and that it was contrary to Ms Ndudane's version;

(c) that I erred in declaring the settlement agreement to be invalid and in reviewing it and setting aside; and that I should not have rejected Ms Ndudane's version that she was duly authorised;

(d) that in consequence of the foregoing, I erred in rescinding Steyn J's order;

(e) that I erred in ordering BXI to repay R20,242,479,90 by 30 April 2020, in that I failed to exercise my discretion, in terms of s 172 of the Constitution, by not instead ordering that BXI's bills of costs be taxed in order to enable the court to make a just and equitable order.

[20] In argument, however, Mr Bridgman acknowledged that the SLA had correctly been found to be invalid for non-compliance with proper procurement procedures. He did not accept that the SLA was invalid on the further ground of Mr Mlengana's supposedly unwitting signature of the document, but he relied on this factor (the second ground of appeal) only insofar as it bore on just and equitable relief. He persisted with the argument that I should not have set aside the SLA as part of the just and equitable relief, even though I had correctly declared it to be invalid.

[21] Mr Bridgman further conceded that, on the evidence which was placed before me, I correctly found that Ms Ndudane was not authorised to sign the settlement agreement and that the settlement agreement was for this reason invalid. (He intimated that evidence adduced in the proceedings before Smith J might have led to a different outcome.) I may add here that, subsequent to my judgment in the main case, the Supreme Court of Appeal in *Valor IT v Premier,*

Northwest Province & others [2020] ZASCA 62; [2020] 3 All SA 379 (SCA) held that a settlement agreement, which purported to legitimise a contract which was unlawful because of non-compliance with public procurement prescripts, was unlawful and should not have been made an order of court, and that the order in question had thus rightly been rescinded.

[22] He further acknowledged that I had not erred in finding that Steyn J's order should be rescinded on the ground of Ms Ndudane's lack of authority. He conceded, furthermore, that I had not erred in finding that the settlement agreement could in any event not have been made an order of court because it did not settle pending litigation, though he submitted that this was not a ground on which the DAFF could have the Steyn J order rescinded; it was, he argued, an appeal point.

[23] Finally, Mr Bridgman accepted that the warrants of execution were invalid. On that point he was, in his colourful expression, 'dead in the water'. Indeed, the application for leave to appeal does not attack my finding that the warrants were invalid. This is not only because Steyn J's order fell to be rescinded; the warrants were in any event invalid because of wholescale non-compliance with the State Liability Act.

[24] As to Mr Mlengana's signature on the SLA, I explained my reasoning in paras 16-20 of the judgment. I emphasise, again, that BXI's counsel did not, during the hearing of the main case, ask for Mr Mlengana's cross-examination in terms of rule 6(5)(*g*).

[25] Regarding the complaint that Mr Mlengana's version of a fraud was only alleged in reply, it is necessary to bear in mind the circumstances in which the application was launched. The background is set out in the main judgment. The proceedings were launched on an urgent basis on 5 August 2019 in order to halt

the execution of the warrants. This was the urgent Part A relief. Mr Mlengana's founding affidavit was devoted almost exclusively to the process of execution. Very little was said about the Part B relief. Para 5.1 of Part B called upon BXI to make discovery of the original SLA 'purportedly' signed by Mr Mlengana, and para 7 sought the reviewing and setting aside of the SLA 'purportedly' signed by Mr Mlengana. When the SLA was referred to in passing in para 18 of the founding affidavit, Mr Mlengana described it as the agreement which he 'purportedly' signed.

[26] BXI delivered preliminary opposing papers on 8 August 2019, and the DAFF replied later that day. In his opposing affidavit, Mr Xulu said that he did not understand why Mlengana repeatedly referred to his signature on the SLA as 'purported'. In his preliminary replying affidavit, Mr Mlengana explained, in para 160, why he denied having signed the SLA and how it might have come about that he unwittingly signed what turned out to be the last page of the purported contract.

[27] The matter served before me that afternoon. It was postponed to 19 August to enable further information and affidavits to be filed relating to the execution of the warrants and the disbursement of attached monies. Ms Ndudane filed her affidavit on 14 August to provide clarity on matters pertaining to her. On 19 August the matter stood down again, and on 21 August I made an order by agreement having the effect that the Part B relief would be heard on 29 November 2019. This included the SLA review relief. Para 6 of the order permitted the DAFF to file further affidavits by 9 October 2019 in relation to Part B2 of the notice of motion (this encompassed the review of the SLA), and paras 7 and 8 specified a timetable for supplementary answering and replying papers.

[28] On 14 October 2019 DAFF delivered its supplementary papers, including an affidavit by Mr Mlengana and an affidavit by Mr MI Abader, the second of these affidavits being the second applicant's founding affidavit in support of the relief claimed by the DAFF. In his affidavit, Mr Mlengana stated that he had only learnt of the SLA after returning to office from suspension on 23 April 2018 (paras 12 and 75). Mr Abader's affidavit repeated the allegation that Mr Mlengana had not (knowingly) signed the SLA, and Mr Abader alleged that the SLA had been fraudulently concluded (paras 48 and 59.9).

[29] BXI delivered its supplementary answering papers on 11 November 2019. Former Minister Zokwana's affidavit formed part of those papers. As I have said, Mr Zokwana did not deal with the signing of the SLA. With reference to Mr Abader's discussion of the Auditor-General's reports of 2016/2017, Mr Xulu alleged, in para 44 of his affidavit, that despite the alleged irregularities, the DAFF had apparently been satisfied with the SLA, because no attempt was made by the DAFF to set it aside after the Auditor-General's report was published.

[30] The DAFF's supplementary replying papers, including an affidavit by Mr Mlengana, were served on 18 November 2019. It was at this point, in response to para 44 of Mr Xulu's supplementary answering affidavit, that Mr Mlengana stated that he had not been aware of the SLA before he was suspended and that when he learnt of it, after returning from suspension, he had reported the alleged fraud to the Hawks (paras 31-32; see also paras 37 and 40-41). In making these allegations, Mr Mlengana was replying to Mr Xulu's assertion that the DAFF seemingly been satisfied with the SLA.

[31] BXI filed further responding affidavits on 29 November. Mr Xulu said in his affidavit that he could not allow Mr Mlengana's allegations of fraud to go unchallenged. Mr Xulu alleged that if there was a fraud, BXI was not a party to it.

The applicants, by way of a supplementary replying affidavit from their attorney, assured the court and BXI that the applicants were not alleging fraud on the part of BXI.

[32] Given that the application was launched in urgent circumstances and was primarily concerned at that stage with halting the process of execution, it cannot be held against the DAFF that it did not deal more fully in its founding papers with the circumstances under which the SLA came to bear Mr Mlengana's signature. Mr Mlengana subsequently stated that the founding papers had been prepared under great time constraints and without the benefit of full consultation. Within three days of launching the application, and in response to BXI's preliminary opposing papers, the DAFF filed replying papers in which Mr Mlengana set out the main elements of his version. Ms Ndudane's affidavit followed six days later, and she could thus deal with Mr Mlengana's allegations. The DAFF as well as the second applicant were, furthermore, entitled to supplement their case on review, and did so on 14 October 2019. BXI had ample time to respond, which it did on 11 November 2019. Since former Minister Zokwana's affidavit was filed as part of the latter papers, he was in a position to deal with all of Mr Mlengana's allegations relating to the signing of the SLA.

[33] In these circumstances, to which I may add the absence of an application to strike out, I do not think there is any reasonable prospect of another court finding that I should have ignored the allegations made by Mr Mlengana about the signing of the SLA in his replying affidavit of 8 August 2019 and in the supplementary papers of 14 October 2019. Even Mr Mlengana's supplementary replying affidavit of 18 November 2019 was one to which Mr Xulu delivered a responding affidavit. Furthermore, the allegation of deceit in Mr Mlengana's affidavit of 18 November was simply a logical deduction from what he had already said in his affidavit of 8 August 2019. The important point is not whether

a fraud was committed and if so by whom; the point is that, on Mr Mlengana's version, he did not knowingly sign the SLA.

[34] Mr Bridgman submitted that although I mentioned six factors (in para 17) which lent support to Mr Mlengana's denial of witting signature of the SLA, I had omitted to consider factors which pointed the other way. Among these were the following:

(a) Mr Xulu alleged in his papers that the DAFF's non-payment of his firm's fees was a personal vendetta against him by Mr Mlengana because of BXI's work with law enforcement agencies to combat undue influence, maladministration, criminality and corruption in the DAFF. This was consistent with views expressed by the National Treasury and the PSC. (In other words, in view of the vendetta, Mr Mlengana had a motive to lie about his signing of the SLA.)

(b) Mr Mlengana's version – that he became aware of the SLA in late July 2018 and then reported it to the Hawks as a fraud – was inconsistent with other evidence:

(i) He made no mention of unlawfulness or fraud when attempting to terminate BXI's services in his letter of 15 August 2018 or when effectively reappointing BXI to work on the Bengis matter on 20 August 2018.

(ii) According to the affidavit of National Treasury's Acting Accountant General, Ms Mxunyelwa, Mr Mlengana had himself said that BXI was appointed 'by a deviation process'.

(iii) Mr Mlengana's excuse that he should not have given in to pressure from National Treasury was 'lame', and should have been rejected.

(iv) Mr Mlengana had repeatedly promised to pay R20 million to BXI, which was inconsistent with his version that he doubted the lawfulness of BXI's appointment.

[35] All the above matters were mentioned, albeit in other contexts, in the course of my judgment. I did not overlook them. I do not recall the argument being made that the alleged 'vendetta' was a circumstance showing that Mr Mlengana was lying about his signing of the SLA. I do not think that the argument has force. The DAFF's primary attack on the SLA was the absence of proper procurement procedures. Mr Mlengana did not need to deny his signature in order to pursue the alleged vendetta.

[36] In regard to the termination of BXI's services on 15 August 2018, Mr Mlengana did not refer to the SLA at all. The position was that BXI was *de facto* rendering services, allegedly on the strength of mandates from former Minister Zokwana. Mr Mlengana wished to terminate BXI's role as a service provider. As my judgment indicates, Mr Mlengana stated that he was under pressure from former Minister Zokwana to keep BXI on board, hence the revival of BXI's role in relation to the Bengis matter. This did not involve any recognition of the SLA or its validity. Again, Mr Mlengana made no mention of the SLA in his letter of 20 August 2018.

[37] According to Mr Mlengana, the pressure from former Minister Zokwana permeated his interactions with National Treasury. The passage from Ms Mxunyelwa's affidavit upon which Mr Bridgman particularly relied (paras 30-31 at record 255) does not, on my reading of it, constitute an allegation that Mr Mlengana said that BXI had validly been appointed through a deviation process. There was talk of regularising BXI's *de facto* appointment as a deviation by

approaching National Treasury for condonation of possible irregular expenditure. This was in the context of providing a legal foundation for a settlement.

[38] As to the agreement to pay BXI R20 million, my judgment fully explained the circumstances in which this came about. It was not a promise made with reference to the SLA.

[39] I thus do not believe that the circumstances to which Mr Bridgman pointed would be regarded by an appellate court as justifying a rejection of Mr Mlengana's allegation that he did not wittingly sign the SLA. Those circumstances may have provided material for cross-examination if leave had been sought to have him give oral evidence, but this did not happen. Ultimately, I had the direct evidence of a person with knowledge (Mr Mlengana), who says he did not wittingly sign the SLA, and no countervailing evidence from the two other persons who might have had personal knowledge to the contrary (former Minister Zokwana and Ms Memani).

[40] In any event, I do not consider that a finding that Mr Mlengana's version should have been rejected would be regarded by as an appellate court as affecting the just and equitable relief which I granted (and this is the only respect in which Mr Bridgman invoked this factual issue). As I stated in paras 117-119 judgment, the factors on which I principally relied not to defer repayment indefinitely pending finalisation of the verification process were:

(a) that BXI's problems were not limited to non-compliance with the State Liability Act; that I would also be rescinding Steyn J's order and setting aside the settlement agreement and the SLA; and that there was thus little prospect of BXI obtaining an executable judgment in the near future;

(b) that BXI was the author of its own misfortune, by disbursing the greater part of the attached monies after it was notified that the execution was invalid

because of non-compliance with the State Liability Act (Mr Bridgman did not argue that this finding was not justified).

[41] I counter-balanced the above considerations with those mentioned in paras 120-122. The primary reason for BXI having to repay the money was not that the SLA was invalid or that BXI had not performed work of value for the DAFF (the latter being something on which I was not in a position to make a determination); the primary reason was that BXI had obtained the DAFF's money by an unlawful process of execution based on a judgment which fell to be rescinded.

[42] What I have just said also has an important bearing on delay as a factor relevant to just and equitable relief. In my main judgment I explained why I did not regard the DAFF's delay in seeking the review of the SLA as unreasonable and why in any event I would condone the delay. However, my primary reason for ordering repayment of the money (which is the only thing BXI still wishes to challenge on appeal) was not that the SLA was invalid; my reasons had to do with the unauthorized settlement agreement (12 April 2019), the rescission of the Steyn J order (made on 6 June 2019), and particularly the wholly unlawful process of execution (19 June 2019 and following). There was no undue delay, in these respects, in the launching of the review application.

[43] Mr Bridgman did not contend that, if a repayment order was warranted, the date I determined (30 April 2020) was unreasonably short. DAFF was able to complete its process of verification and submit its report to BXI before that date. (I was told that the DAFF did not tender to pay BXI anything more, and has in fact issued summons to recover money paid to BXI prior to execution.) In any event, because of the application for leave to appeal, which suspended my order, BXI has *de facto* had an additional four months since 30 April 2020.

[44] A final consideration is the practical difficulty in formulating a just and equitable remedy such as BXI had in mind. In essence, BXI wanted me to order that its bills of costs be taxed. But by whom? On what scale? How would the taxing authority (whoever it was) determine disputes about whether BXI had valid mandates to perform particular work? The SLA, even if it was not set aside, did not in terms refer to any matters other than the restitution of money to the South African government in the Bengis case, whereas BXI claims the existence of mandates from the Minister to perform work on a number of other cases. The validity of those mandates was not an issue before me. I was simply not in a position to rule that BXI was entitled to the taxation of all the bills prepared by its costs consultant.

[45] I have thus come to the conclusion that the proposed appeal does not enjoy reasonable prospects of success. I have reached this conclusion without going into the question whether, in the case of a legality review, the determination by a trial court of 'just and equitable relief' in terms of s 172(1)(*b*) of the Constitution involves a discretion in the true (narrow) sense or a broad value judgment. The same question would arise, in PAJA reviews, in the determination of just and equitable relief as contemplated in s 8(1) of PAJA. For the distinction between these two kinds of discretion, see *Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited* 1992 (4) SA 791 (A) 800E-H and *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 82-92.

[46] The *Trencon* judgment may well point to a conclusion that the determination of just and equitable relief involves the exercise of a discretion in the true or narrow sense. If that is so, the absence of reasonable prospects of

success in this case would be fortified because of the constraints on the appellate court in interfering with the way I exercised my discretion.

[47] The applicants in the main case asked that I dismiss the application for leave with the costs of three counsel. I declined to make such an order in the main case and see no reason to do so now.

[48] I make the following order:

The application for leave to appeal is refused with costs, including the costs of two counsel, such costs to be paid by the first and fifth respondents jointly and severally.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicants	N Bawa SC (with her B Joseph SC and J Williams) Instructed by State Attorney 4th Floor, 22 Long street Cape Town
For First & Fifth Respondents	M J M Bridgman Instructed by Millar Reardon Attorneys, Durban c/o B Xulu & Partners Inc 9th Floor, 113 Loop Street Cape Town