IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA 333/2011
Date Heard: 19 March 2012
Date Delivered: 23 April 2012
REPORTABLE

In the matter between:

REON KOCKJEU Appellant

and

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS Respondent

JUDGMENT

GOOSEN, J:

[1] This is an appeal against the confirmation of an *ex parte* restraint order granted in terms of section 26(1) of the Prevention of Organised Crime Act, 121 of 1998 (hereinafter POCA). The respondent obtained an *ex parte* order on 28 June 2011. Service of the order was effected on the appellant on 27 July 2011. The appellant immediately filed a notice to anticipate the return date and thereafter filed an answering affidavit in opposition to respondent's application. The matter was then set down for hearing on 1 August 2011. No replying affidavit was filed by the respondent and the matter was argued before the court *a quo* on that date. Judgment, confirming the interim restraint order, was thereafter delivered on 22 September 2011.

[2] The appellant was employed as the store manager at the Queenstown premises of Weirs Cash and Carry (hereinafter “Weirs”). The appellant was cited as the first respondent in the application for a restraint order. Weirs carries on business as a wholesale retailer of consumer goods which it supplies to customers in the region. In the conduct of its business Weirs from time to time grants to its customers credit facilities to enable such customers to purchase goods on account. The second and third respondents in the restraint application are Ishmail Molla and Shamish Sadab who are members of a registered close corporation, First Fortune Investments 2 CC trading as Sentra Supermarket (hereinafter “Sentra”). Sentra was cited as the fifth respondent in the restraint application. The fourth respondent, one Rafiq Molla, was employed by Sentra.

[3] During or about 2007 Weirs granted to Sentra a formal credit facility in an amount of R600 000.00. This credit facility was subsequently extended in September 2009 when it was set at R2.4million.

[4] During September 2010 it was discovered that the credit account extended to Sentra reflected a debit balance of an amount in excess of R15.5million. Eleven cheques issued by Sentra and drawn on its bank in favour of Weirs had been dishonoured by the bank. The appellant made certain disclosures and admissions to the senior management of Weirs. An investigation conducted by Weirs found that the appellant had permitted Sentra to make purchases in excess of the credit facility extended to it. This had been achieved by “manipulating” the credit facilities of other customers by using them to enable Sentra to make purchases. As a consequence of

these discoveries a criminal charge of fraud was laid against, *inter alia,* the appellant. The appellant was aware of the fact that charges had been laid and, it appears, co-operated with the police investigation.

[5] As indicated above an *ex parte* application for a restraint order, in which it was sought to restrain the appellant from dealing with certain of his assets, namely an immovable property in Queenstown, a motor vehicle and funds held by him in his banking account, was brought in June 2011.

[6] The respondent's case for the granting of a restraint order against the property held by the appellant is formulated in the founding affidavit in the following terms. It is alleged that the appellant together with Sentra and the other individuals will be charged with 1400 counts of fraud relating to unlawful purchases made from Weirs. It is alleged that the appellant, with the connivance of the members and employees of Sentra Supermarket, utilised the credit facilities granted to other customers in order to effect purchases in an amount in excess of the credit facility granted to Sentra. The use of the credit facilities of other customers was without the knowledge of these customers and, so it is alleged, had the effect of misrepresenting to Weirs that the credit facility of Sentra was being maintained within the limits determined by Weirs. Goods to the value of more than R8.6million were purchased using the accounts of other customers and, when said amount was debited to the Sentra account the balance stood at more than R15million. It is therefore alleged that the appellant (and the other respondents) benefited in consequence of this fraudulent activity in an amount in excess of R15 million.

[7] In the answering affidavit filed by the appellant two grounds are advanced upon which the confirmation of the interim restraint order was resisted. The first of these concerned the fact that the application was brought *ex parte*, and in particular that the respondent had failed to make full disclosure of facts known to it and which were material to the granting of the order. The second ground advanced was that the respondent had failed to make out any case that the appellant had benefited from the alleged fraud. The appellant denied that he had benefited from the offences it was intended to prefer against him.

[8] It is appropriate to deal with the averments made by the appellant in regard to these issues in some detail. In regard to alleged material non-disclosure reference was made to the failure to disclose a suretyship agreement entered into between the appellant and Weirs in which appellant assumed liability as surety for the payment of all amounts due to Weirs by Sentra in excess of R2.4million. It was also alleged that an affidavit filed by appellant in a summary judgment application brought by Weirs against, *inter alia*, appellant had not been disclosed and that the respondent had failed to annex to its papers statements made by other customers of Weirs which were exculpatory of appellant.

[9] The respondent did not file a replying affidavit seeking to deal with the allegations of non-disclosure and did not deny that the evidence referred to by the appellant was in its possession at the time that the *ex parte* application was initiated.

[10] The summary judgment affidavit contains an explanation by appellant of the manner in which the credit facility extended to Sentra was managed by Weirs. According to this affidavit Sentra had been a customer of Weirs for more than 8 years and the individuals involved were well known to the appellant. Prior to 2007 Sentra had operated a running account with Weirs (apparently without a formal credit facility). At times the debit balance on this account would fluctuate between R500 000 and R1million. The account was monitored by the head of Weirs. At that stage the appellant, as store manager, only had a credit mandate of approximately R40 000. Sentra's account had however been operated well in excess of this amount for many years with the knowledge of both the regional and head office management.

[11] In June 2007 Weirs required Sentra to complete a credit application and a credit facility of R600 000 was granted to Sentra. Notwithstanding this the trading pattern on the account regularly exceeded this credit limit. In 2009 the limit was increased on the accounting system operated by Weirs to an amount of R2.4million. Still, this limit was regularly exceeded because of the volumes of trade concluded between Sentra and Weirs. This fact was discussed by appellant with his superiors.

[12] In September 2009 the appellant was presented with a draft suretyship agreement. According to him he was informed by the regional manager of Weirs and the credit manager that the Weirs Board required him to enter into the suretyship agreement in terms whereof he provided security to Weirs for the payment by Sentra

of all amounts owed by Sentra in excess of R2.4million. He was told that “if you are happy to do the business you should be happy to sign the suretyship”.

[13] Appellant states that he felt compelled to enter into the agreement. He could either enforce the R2.4million credit limit and risk losing Sentra as a customer or he could attempt to control the risk as had been done up to that point. He therefore signed the suretyship agreement. At the stage that he did so the Sentra account stood at R3.8million.

[14] The appellant also alleged that the respondent had failed to disclose the fact that his use of the credit accounts of some customers had occurred with their approval and that the respondent was in possession of statements from witnesses to this effect. Only one such statement had been disclosed by the respondents.

[15] In regard to the alleged failure by respondent to make out a case that the appellant had benefited from the alleged offences, the appellant denied that he had benefited along with Sentra and the other individuals in an amount in excess of R15million. The appellant also addressed the allegation that certain payments received by him from one “Rafiq” in the amount of R260 000 were related to his alleged role in the fraud perpetrated on Weirs. He denied the allegation and explained the transactions. He pointed out that he had advanced money to Sentra because they were experiencing cash flow problems. He had sourced the money from his bond account and had paid the sums to Sentra by way of cheques. He annexed copies of the cheques in proof of such payments. The money deposited

into his banking account by “Rafiq” were amounts paid in settling the loans he had made to Sentra.

[16] As already indicated the respondent did not file a replying affidavit dealing with any of these allegations.

[17] The appellant raised three issues on appeal. The first two, namely the *ex parte* nature of the application and the fact that the respondent had not disclosed material facts and the failure to establish that the appellant had benefited from the commission of the offences were matters that had been fully ventilated before the court *a quo*. On appeal it was contended that the court *a quo* had erred in its findings that the non-disclosures were not material and that the respondent had indeed made out a case that the appellant had benefited.

[18] The third issue raised concerned the powers granted to the *curator bonis* in terms of the restraint order. In this regard it was contended that POCA does not make provision for the granting of powers of search and seizure to a curator and, to the extent that the restraint order is to be upheld, the powers of the curator ought to be amended to exclude powers of search and seizure of property.

The provisions of the Act

[19] The preamble to POCA asserts the principle that no person convicted of an offence should benefit from the fruits of that or any related offence. The underlying purpose of POCA is to give effect to this principle and to provide for mechanisms

whereby persons convicted of criminal activity are stripped of the proceeds of their crimes, thereby removing the incentive for crime (*National Director of Public Prosecutions v Mohammed NO* 2002 (4) SA 843 (CC) at para [14] ff).

[20] Two separate mechanisms are created. Chapter 6 provides mechanisms whereby property that is found to be an instrumentality in the commission of the offence may be declared to be forfeit to the state. Such forfeiture is not dependant upon the owner or possessor of the property having been found to be guilty of the offence in which the property is alleged to have been an instrumentality. The focus is the property and its relationship to the commission of the offence. This forfeiture procedure is, of course, subject to a number of procedural and other safeguards which are designed to protect the legitimate interests that parties may have in the property concerned.

[21] The other mechanism, provided for in Chapter 5, deals with the proceeds of unlawful activities. Part 1 of that chapter deals with the application of the chapter and provides for the definition of “realisable property”; the determination of value and the manner in which proceedings against a defendant are conducted. Importantly, section 13 of POCA provides that proceedings for a confiscation order or restraint order are civil proceedings and that the rules of evidence applicable to civil proceedings apply to such proceedings.

[22] Section 18 deals with confiscation orders and provides, as follows:

> (1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from:
>
> a. That offence;
>
> b. Any other offence of which the defendant has been convicted at the same trial; and
>
> c. Any criminal conduct which the court finds to be sufficiently related to those offences;
>
> And, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

[23] The procedure by which a confiscation order may be obtained may only be initiated upon conviction of an accused person. At that stage the public prosecutor, acting under a written direction by the national director, may make application to the court to conduct an enquiry into the question as to whether the accused / defendant derived any benefit from the offence of which he or she has been convicted. Upon the determination of that question the court may make a confiscation order and any other deemed necessary to give effect thereto. These confiscation order proceedings are wholly separate from the criminal proceedings conducted against the defendant.

[24] In order to give effect to the purpose to be served by a confiscation order POCA provides, by way of section 26(1), for the issuing of a restraint order in terms whereof an order may be made prohibiting the disposal of property pending an application to be made in terms of section 18. The purpose of a restraint order is to

preserve property in order to enable the realisation of value to meet a confiscation order.

[25] Section 26(1) provides that:

> The national director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with the property to which the order relates."

[26] Section 25 provides that:

> (1) A High Court may exercise the powers conferred on it in terms of section 26(1)
>
> a. When-
>
> i. A prosecution for an offence has been instituted against the defendant concerned;
>
> ii. Either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
>
> iii. The proceedings against that defendant have not been concluded; or
>
> b. When-
>
> i. That court is satisfied that a person is to be charged with an offence; and
>
> ii. It appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.

[27] Consideration of these provisions indicates that a provisional restraint order may be sought on an *ex parte* basis and that the court considering the granting of a restraint order must be satisfied that there are reasonable grounds for believing that a confiscation order will, in due course, be made against the defendant concerned.

[28] At the stage of a restraint order application the court is not concerned with either the guilt of the defendant or whether the defendant in fact derived a benefit from the offence. Since the proceedings are in their nature preliminary and designed solely to preserve the status quo, the court is concerned only with establishing whether there is a reasonable possibility that the defendant will be convicted and that a confiscation order will be made.

The argument on appeal

[29] The appellant argued that the respondent ought not, in the circumstances of this matter, to have proceeded to obtain an interim restraint order by way of an *ex parte* application. It was argued that while section 26 of POCA is permissive in respect of an *ex parte* application it is nevertheless incumbent on the respondent to have laid a basis for the use of the *ex parte* procedure.

[30] In *National Director of Public Prosecutions v Mohammed NO* 2003 (4) SA 1 (CC) the Constitutional Court considered the interpretation of section 38(1) of POCA in the context of the development of the law relating to *ex parte* applications. The court found (at para [33]) that:

> The phrase in s 38 '(t)he National Director may by way of and *ex parte* application apply' means no more than that, if the National Director is desirous of obtaining an order under s 38, she or he may use an *ex parte* application, in the sense defined in para [27] above. It sanctions a particular initiating procedure to be employed when relief of a particular nature is being sought. An important consequence of this is that an application by the National Director under s 38 can never be dismissed solely on the ground that it has been brought *ex parte*.

[31] It is important to note that the Constitutional Court referred, in the quoted passage, with approval to a finding made in *Director of Public Prosecutions : Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) where that court came to a similar conclusion in relation to section 16 of the Proceeds of Crime Act, 76 of 1996. POCA repealed the Proceeds of Crime Act and section 26 is formulated in essentially identical terms to the erstwhile section 16.

[32] I can see no reason why section 26(1) should not be construed in terms similar to section 38(1). The section sanctions an initiating procedure and whilst it no doubt entitles the national director to proceed other than by way of an *ex parte* application where the national director has chosen such procedure the application cannot be dismissed solely because it was brought *ex parte.* The court *a quo*'s finding in this regard cannot be faulted.

[33] Mr Paterson, however, further argued that when the national director elects to proceed *ex parte* he or she is bound, in terms of the ordinary principles, to display the utmost good faith in such application and is bound therefore to make full disclosure of all material facts which may have a bearing upon the granting of such order.

[34] I agree. There can be no doubt that where the national director proceeds by way of an *ex parte* application a full and proper disclosure of all relevant facts must be made in the application papers. In *National Director of Public Prosecutions v Braun and Another* 2007 (1) SA 189 (C) it was found, in relation to *ex parte*

proceedings in terms of section 38 of POCA, that the provisions of section 38 do not relieve the national director of the normal burden imposed on every applicant who approaches a court for an *ex parte* order. The same applies, in my view, to an application made in terms of section 26(1).

[35] The burden imposed upon an applicant who seeks relief by way of an *ex parte* application requires that he or she adheres to the requirements of *uberrima fides.* Thus, all material facts that *might* influence a court in coming to a decision must be disclosed (see *De Jager v Heilbron and Others* 1947 (2) SA 415 (W) at 419; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349). Disclosure must be made of averments made by a respondent even if such averments are not satisfactory to the applicant. Where the applicant is aware of the respondent's defence – such as it may be – it must be disclosed (*Spilg v Walker* 1947 (3) SA 495 (E) at 501; *Godlonton NO v Ryan Scholtz & Co (Pty) Ltd* 1978 (4) SA 84 (E) at 87E).

[36] Mr Paterson argued that the respondent had not made such full and proper disclosure and that the court *a quo* erred in failing for such reason to discharge the interim restraint order which had been granted. In countering this argument, Mr Ackermann for the respondent, pointed to the fact that the suretyship was disclosed inasmuch as reference to the fact of such suretyship is to be found in a supporting affidavit filed in the application. This does not, in my view, amount to disclosure. Even if reference was made to it, the circumstances in which it was executed and the import of the document was not explained nor was the applicant's version in regard thereto disclosed. It was further argued however that the court *a quo* had

indeed considered the facts drawn to the attention of the court and did not find that these were material facts that ought to have been disclosed.

[37] The court *a quo* made no finding as to the materiality of the facts not disclosed. Instead the court found that even if the facts had been disclosed this would not have altered the decision to issue an interim order. The court *a quo* dealt with the argument as to non-disclosure in the following terms:

> Mr Paterson also argued that the Applicant failed to disclose certain information and thereby failed to comply with the suretyship signed by the first defendant. There has been movement of money between first defendant and fifth defendant.
>
> In my view, even if the above mentioned information was disclosed the granting of the *ex parte* order would have been justified.

[38] In my view the court *a quo* misdirected itself in regard to the approach to a failure to disclose material facts. The court was required to determine whether the requirement that *uberrima fides* be displayed by an applicant who was in possession of relevant facts has been complied with. When once it had made such a finding the court could then, in the exercise of its discretion, decide whether to discharge the interim order or confirm it notwithstanding the non-disclosure.

[39] Although the court *a quo* erred in its approach to this issue I do not consider that it is necessary to deal further with the point taken by the appellant, namely that the application ought to have been dismissed on the basis that the respondent had not disclosed material facts. I take this view because, in my view, the confirmation of

the interim restraint order is susceptible of a more fundamental challenge, namely that the court *a quo* erred in finding that the respondent had made out a case that there is a possibility that a confiscation order will be made. I turn now to this issue.

[40] In order to obtain a restraint order it is necessary to show that there is a reasonable possibility that (a) the defendant will be convicted of an offence and (b) that a confiscation order will be made.

[41] In *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA) the court was concerned with the question whether, in circumstances where there is an identifiable victim who may have a claim against the defendant a restraint order could nevertheless issue. The court answered the question in the affirmative. Its reasoning, for present purposes, is not relevant. However, in dealing with the test to be applied at the stage of the restraint application, the court remarked (at par 20) that:

> A court is not required to be satisfied of the guilt of the defendant before a restraint order is granted. What is required, *inter alia*, is only that there should be reasonable grounds for believing that the defendant may be convicted. The material facts in the present case are substantially not in dispute…..It is sufficient to say that, in my view, there are indeed reasonable grounds for believing that the respondent may be convicted and that a confiscation order may be made.

[42] In *National Director of Public Prosecutions v Tam* 2004 (2) SA 500 (W) Gildenhuys J said:

> The purpose of a restraint order is to preserve property so that it might in due course be realised in satisfaction of a confiscation order. A restraint order should not be made unless the applicant has discharged the onus of showing a reasonable prospect of obtaining both a conviction in respect of some or all of the charges levied against the accused person and a subsequent confiscation order. To establish such a reasonable prospect, the nature and tenor of the available evidence need to be disclosed.

(my emphasis)

[43] A slightly different view is expressed in *National Director of Public Prosecutions v Alexander and Others* 2001 (2) SACR 1 (T) where at 8d it is stated:

> It must therefore appear to the court that there are reasonable grounds, obviously at the time of the application, to believe that a confiscation order following conviction *may* – and not *will* – be made. Naturally the law of evidence applies. However, the court hearing the restraint order application clearly does not have to be convinced in terms of any particular burden of proof that a conviction and confiscation will follow. The court has to form an opinion based on appearance and reasonableness as to future possibilities. I, respectfully, am not of the opinion that it could be argued on the wording of section 25(1) that a court has to be satisfied on a balance of probabilities that a conviction and confiscation order will indeed follow.

[44] I agree that section 25 does not posit a burden of proof in the ordinary sense. Nevertheless a restraint order can only be made if there is indeed a reasonable possibility that <u>both</u> conviction and a confiscation will follow. This requires that the court be satisfied that the nature and tenor of available evidence indicates a reasonable possibility of a conviction. It also requires – under separate consideration – that the available evidence points to a benefit derived by the defendant from the offence(s) charged or to be charged and therefore that a confiscation order will follow. It cannot without more be assumed that in the event of a conviction a confiscation order will be made. Confiscation is not an automatic consequence of conviction. Confiscation requires a finding by the court conducting the enquiry that the defendant has benefited and that such an order is appropriate in the circumstances. For this reason the court considering the restraint application must guard against conflating the two requirements set for the granting of such an order.

[45] Turning to the facts of the matter, it was argued that the respondent had made out no case at all in respect of the alleged benefit derived by the appellant. To the extent that the founding affidavit deals with the issue of an alleged benefit it does so in the form of a broad sweeping statement to the effect that "(t)he total benefit illegally obtained by the defendants as a result of the fraud is R13 128 192 which is calculated by subtracting the R2 400 00, which was the credit limit contracted between the parties, from the total amount of R15 558 037.57".

[46] This allegation is based on an assumption that the appellant whom it is alleged was a party to the fraud "must" have benefited to the extent of the fraud. This much was argued by Mr Ackerman on behalf of respondent. It need hardly be said that more than mere assumptions are required.

[47] The founding affidavit also alludes to certain payments made into the appellant's bank account by one "Rafiq" namely two amounts totalling R260 000. The allegation is then made that "it *prima facie* appears that [appellant] received payment…which in all probability relates to the role that he played as store manager to defraud Weirs Cash and Carry".

[48] This allegation is denied by the appellant who in his answering affidavit sets out further payments received. He explains, with supporting documents in the form of cheques, that he loaned money to the Fourth Respondent to assist with cash flow problems he was encountering with the business of Sentra and that the payments received by him constituted the repayment of those loans. This evidence was not

challenged in reply and accordingly appellant's version and explanation stands uncontradicted.

[49] In dealing with the question as to whether it is possible that a confiscation order will be granted based on an alleged benefit received by the appellant, the court *a quo* dealt with the transactions entered into between the appellant and fourth respondent in some detail. In essence the court *a quo* undertook an analysis of the transactions and the bank statements annexed to the appellant's answering affidavit in order to conclude (although not stated in express terms) that a reasonable possibility exists that a confiscation order would be made.

[50] Mr Paterson described the exercise undertaken by the court *a quo* as being one in which the learned judge undertook his own investigation of the bank statements and dealt with transactions not addressed in the affidavits. By so doing, it was submitted, the learned judge took upon himself the role of investigator and in effect wrote the replying affidavit without giving the appellant the opportunity to address the transactions upon which the judge relied.

[51] A careful consideration of the judgment reflects that the court *a quo* did indeed undertake an analysis of transactions entered into between the appellant and the fourth respondent. In doing so the court *a quo* dealt with a number of entries in bank statements to which no reference was made in the opposing affidavits and came to conclusions which in effect went behind the averments set out in the appellant's opposing affidavit. The court *a quo* furthermore drew inferences and

conclusions based on an assessment of the probabilities and, albeit to a limited extent, relied upon facts not pertinently averred in the affidavits before the court.

[52] In this regard the court *a quo* misdirected itself. The respondent had put up a case – although set out parsimoniously – that the appellant had benefited from the alleged criminal conduct in which he had been involved. That case was met by the appellant who denied that he had benefited. He presented evidence, supported by documentary proof, that provided an innocent explanation for the transactions between himself and the fourth respondent. The respondent filed no replying affidavit in which it sought to gainsay nor undermine the averments made by the appellant.

[53] It is trite that the purpose of a replying affidavit is to answer and deal with averments raised by a respondent by way of defence to an application. Where an applicant does not file a reply to a defence raised by the respondent, particularly where the averments to found the defence call for a response, the allegations made by the respondent stand uncontroverted and, for the purposes of the adjudication of the matter the court dealing with the application is bound to accept such averments unless they are so palpably unsustainable as to warrant being rejected out of hand.

[54] In this instance that was certainly not the case. The allegations made by the appellant in explaining the transactions between him and the fourth respondent cannot reasonably have been rejected out of hand.

[55] The effect of the court *a quo's* misdirection was that the court found that the respondent had indeed made out a case – in the sense of establishing as a reasonable possibility – that upon conviction of the appellant a confiscation order may be made. In this regard the court *a quo* erred.

[56] The nature and tenor of the available evidence presented by the respondent may establish that it is likely that the appellant will be convicted of at least some of the charges to be preferred against him. The evidence presented does not however establish that there is a reasonable possibility that a confiscation order will be made. On the contrary, on the evidence presently available it appears unlikely that it will be established that the appellant derived a benefit from the commission of the offences for which he is to be charged.

[57] It follows then that the appeal must succeed. In the light of this conclusion it is not necessary to consider the point raised about the extent of the powers conferred upon the *curator bonis.*

[58] In regard to the costs associated with the appointment of the *curator bonis* it was submitted by the appellant's counsel that such costs should not, in the event that the appeal succeeds, come out of the appellant's estate but should rather be borne by the respondent. I agree.

[59] I would accordingly make the following order:

a. The appeal succeeds.

b. The order granted by Dukada AJ on 22 September 2011 is set aside and is replaced by the following order:

"The provisional restraint order granted by Revelas J is discharged, the applicant to pay the costs of the application."

c. The *curator bonis* is discharged.

d. The respondent is ordered to pay the fees and expenses of the *curator bonis*.

e. The respondent is ordered to pay the costs of the appeal.

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G. GOOSEN
JUDGE OF THE HIGH COURT

EBRAHIM J:

I concur. An order as proposed will issue.

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Y. EBRAHIM
JUDGE OF THE HIGH COURT

SANDI J:

I concur.

_____

B. SANDI
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPELLANT:	TJM Paterson SC, instructed by Wheeldon Rushmere & Cole
FOR THE RESPONDENT:	HM Ackermann, instructed by NN Dullabh & Co.