Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: _____

CASE NO: 2022/9750

DATE: 10 August 2023

In the matter between:

MR STANDFORD SIYABONGA MNCUBE Applicant
(Identity No. […])

and

WESBANK, a division of FIRSTRAND BANK LIMITED Respondent

In re:

WESBANK, a division of FIRSTRAND BANK LIMITED Plaintiff

and

MR STANDFORD SIYABONGA MNCUBE Defendant
(Identity No. […])

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

[1] This matter highlights the interplay between High Court Rule 22, 28 and 32.

[2] This matter is an opposed Rule 30 application launched by the applicant in terms whereof the applicant seeks to set aside the respondent's application for summary judgment as an irregular step. The irregular step contended to have been taken by the respondent is that the summary judgment application is alleged to have been brought out of time.

[3] The respondent opposes the application on the basis that it *"lacks merit"* and is a *"patent abuse of the process of Court"*.

[4] The relevant chronology of the exchange of pleadings and/or notices between the parties are as follows:

[5] The respondent issued summons on the 9th of March 2022. The respondent *inter alia* alleges that the applicant had breached the instalment sale agreement entered into between the parties.

[6] The applicant delivered his notice of intention to defend the action on the 11th of April 2022.

[7] The applicant delivered his plea on the 21st of June 2022.[1]

[8] From the 21st of June 2022 the respondent would have had to deliver its application for summary judgment by the 12th of July 2022, in the normal course and had the applicant not delivered a notice(s) to amend his plea.[2]

[9] The applicant thereafter delivered its notice of intention to amend its plea on the 1st of July 2022 (*"the first intention to amend"*).

[10] The respondent contends that:

10.1 This intention to amend is delivered nine days after the applicant filed his plea and six days prior to the lapse of the timeframes allowed for the filing of the respondent's summary judgment in relation to the plea filed on 20 June 2022;[3]

10.2 The applicant having delivered his intention to amend his plea had to wait until the 15th of July 2022 for the respondent to raise an objection, if any, failing which it had a further ten days within which to effect the amendment, which would have lapsed on the 29th of July 2022.

[11] The applicant thereafter delivered a further notice of intention to amend

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[1] The applicant alleges the date to be the 21st of June 2022 when the matter was uploaded to CaseLines. The respondent alleges the date to be the 20th of June 2022, when the electronic service occurred – CaseLines 13-6. Both parties contended that this issue is neither here nor there, having regard to the circumstances of the matter.

[2] On the respondent's version the date the respondent would have had to deliver its application for summary judgment was by the 11th of July 2022. Rule 32(2)(a) provides that *"within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts".*

[3] The intention to amend is delivered seven days prior to the lapse of the timeframes allowed for the filing of the respondent's summary judgment in relation to the plea delivered on the 21st of June 2022, calculated from the date that the plea was uploaded to CaseLines (on the applicant's contention)

its plea on the 8th of July 2022 (*"the second intention to amend"*). The respondent contends that this intention to amend is delivered:

11.1 the Court day preceding the date on which the summary judgment would have been due on the initial plea filed;[4]

11.2 five days after the first intention to amend was delivered;

11.3 the period in which the respondent had to object to the amendment would lapse on 22nd July 2022 and the amended pages would have been due by the 5th of August 2022.

[12] It is common cause that the applicant delivered his plea consolidating both the abovementioned amendments on the 26th of July 2022.

[13] The respondent thereafter delivered its application for summary judgment on the 17th of August 2022, **being fifteen days after the date on which the applicant's plea consolidating both the amendments was delivered**.

[14] The applicant contends that:

14.1 he delivered his plea on the 21st of June 2022;

14.2 the fifteen day period provided in Rule 32(2)(a) for the bringing of the application for summary judgment lapsed on the 12th of July 2022;

14.3 the application for summary judgment was delivered on 17 August 2022, which was out of time.

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[4] Two Court days preceding the date on which the summary judgment would have been due on the initial plea filed calculated from the 21st of June 2022

[15] The applicant relied on the matter of ***Belrex 95 CC v Barday***[5] and states that in that matter the Court granted an applicant in summary judgment proceedings leave to file further affidavits in support of its application in circumstances where an amendment was brought during the summary judgment proceedings so as to permit the plaintiff to deal with the averments as contained in the amended plea.

[16] In the aforementioned matter leave was granted to address what is described as a lacuna in the law, which permitted amendment proceedings whilst summary judgment proceedings were underway.

[17] Both parties, however correctly concede that this is not the current situation where the amendment was effected after the time period for the launching of summary judgment proceedings had lapsed.[6]

[18] The applicant contends that the amendments sought by the applicant was to introduce a further defence in addition to the defences raised in the original plea which it alleges *"remained intact"*.

[19] The applicant alleges that the respondent not having challenged the original defence by summary judgment proceedings, which it now seeks to do is precluded from challenging same.

[20] The applicant furthermore alleges that he will seriously be prejudiced if the relief is not granted as the applicant (the defendant in the action) will be forced to place his defence under oath and will be mulcted with the costs involved in the summary judgment proceedings.

[21] The applicant seeks an order that the summary judgment proceedings be set aside as irregular proceedings with costs.

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[5] 2021 (3) SA 178 (WCC)

[6] As was the case in ***Belrex*****.**

[22] Mr Shull on behalf of the applicant contends that the respondent was out of time with the delivery of its summary judgment application. If the respondent wanted to deliver its summary judgment application it should have done so within fifteen days after the date of delivery of the initial plea in accordance with the provisions of Rule 32(2)(a), which period lapsed on the 12th of July 2022.[7] Mr Shull argued that the proper procedure to have been followed would have been for the respondent to have delivered the summary judgment application on or before the 12th of July 2023, notwithstanding the fact that the applicant by that time had delivered two notices of intention to amend his plea. On a question posed by me whether the respondent ought to have ignored the applicant's notices of intention to amend and plead to the original plea, argued that based on the ***Belrex 95 CC v Barday*** decision,[8] the respondent should have done so (ignored the two notices of intention to amend) and thereafter should have delivered a supplementary affidavit in the summary judgment proceedings after such time as the amendments had been effected.

[23] Mr Peter argued that after the two notices of intention to amend were delivered the plea *"was still open"* – meaning that the plaintiff was still effective. The application for summary judgment could not have been brought at a time when it was apparent that there was no final plea before the Court and the defences to be raised in the opposing affidavit would not have been dealt with in the summary judgment application. Mr Peter argued that the Rule 30 application by the applicant is a deliberate stratagem to frustrate the finalisation of the summary judgment.

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[7] The application for summary judgment was delivered on 17 August 2022.

[8] *Supra*

DELIBERATION AND APPLICABLE CASE LAW AFTER THE AMENDMENT TO RULE 32

[24] In ***Belrex 95 CC v Barday***[9] the Honourable Henney J was faced with a situation similar to the one the applicant contends should have happened in this matter.[10] In that matter, the plaintiff instituted summary judgment proceedings and the matter was set down despite the subsequent filing of a notice to amend and the amendment had not been effected. The Court *inter alia* held the following:

> *"[32] The difficulty in this case, however, was that in terms of rule 28(2) the time period within which the plaintiff was entitled to raise its objection had not expired (being only six court days) at the time when the application for summary judgment was heard. The notice to amend was served via email on 4 August 2020, as was the filing of the special plea. The amendment therefore had not yet been effected at the time of the hearing of the application for summary judgment. In my view the initial plea was still effective at the time of the hearing of the application. Van Loggerenberg, to a certain extent, addresses the issue which this court is grappling with, where he says a court hearing a summary judgment application is not entitled, in the absence of an affidavit as contemplated in subrule (3)(b), to give leave to defend on the basis of purely a plea or notice of intention to amend, because rule 32 does not provide for such a procedure.*
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> *[33] The learned authors then posed the question as to what should transpire in the event of the defendant giving notice of intention to amend its plea after an application for summary judgment was delivered, and to which proposed amendment the plaintiff*

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9 *Supra*

10 As contended by the respondent.

raised an objection as contemplated in rule 28(2). In regard to this, the authors submit that a defendant must deliver an affidavit which is in harmony with the notice to amend its plea, failing which the summary judgment should be granted; but if the defendant delivers an affidavit which is in harmony with the proposed amendment of the plea and which complies with the provisions of subrule (3)(b), the application for summary judgment should be postponed sine die in order for the defendant to bring an application to amend its plea.

[34] *In this particular case an initial plea had been filed, on the basis of which the plaintiff is seeking summary judgment, accompanied by a supporting affidavit dealing with the initial plea. The defendant's opposing affidavit is not consistent and in harmony with the amended plea, to which the plaintiff will not have a chance to file an additional affidavit because it is prohibited in terms of subrule (4). Once again the amended rule does not make provision for such a procedure and it is also, again, something which Van Loggerenberg states 'was not even considered by the Task Team'.*

[35] *In my view, given the manner in which this application unfolded, it would be difficult, if not impossible, to deal with this application in terms of the amended rule, and for the following reasons: Firstly, the amended plea was not ripe to be adjudicated upon, for want of compliance with the provisions of rule 28(2), for it to have been considered during the summary judgment application. Secondly, even if the amended plea was properly before court, the plaintiff did not deliver a supporting affidavit to deal with any of the issues, especially in relation to whether the defence as pleaded therein raises any triable issue. Thirdly, again even if the amended plea would be considered to be properly before the court, the plaintiff would*

be prohibited from delivering any further evidence, in the form of an affidavit, to address the question whether the defence as pleaded raises a triable issue. Fourthly, should the court ignore the amended plea and ignore the opposing affidavit, because the opposing affidavit is not in harmony with the initial plea, it would defeat the purpose of the amended rule, which requires that the nature and grounds of the defence and the material facts relied upon in the affidavit should be in harmony with the allegations in the plea. Fifthly, it would be manifestly unfair and unjust to the defendant, who has a right to amend his plea at any stage of the proceedings before judgment; even more so if summary judgment should be granted in favour of the plaintiff."

[25] The Court concluded as follows:

"[36] I therefore make no order in respect of the summary judgment application.

[37] The defendant's notice of amendment shall take effect in terms of rule 28(2) as of the date of this judgment, for the plaintiff to exercise its rights in terms of the rule.

[38] ***The plaintiff is given leave to bring a fresh application on the amended plea****, should such an application for amendment be allowed."* (Emphasis added)

[26] In the matter of ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another***[11] the plaintiff had applied for summary judgment in the High Court subsequent to the defendants filing their plea to its summons. In the affidavit resisting summary judgment, the defendants raised defences which they had not originally pleaded. The defendants then amended their plea to bring it in line with the affidavit.

[11] 2022 (3) SA 458 (GJ)

The question in that matter was whether the plaintiff was entitled to file in response – as it sought to – a further affidavit for the purpose of supplementing the founding affidavit it had filed in terms of Uniform Rule of Court 32(2)(a). The defendant's position was that the provisions of Rule 32 (which regulates summary judgment proceedings) precluded the plaintiff from doing so. So, in that interlocutory application relying on Rule 30, they sought to set aside the affidavit. The defendants placed reliance on Rule 32(4) which provided that *"No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) …"*. The defendants acknowledged that the application for summary judgment could not be proceeded with in the circumstances of the amendment of the plea, with the founding affidavit as it was, submitted that a fresh application for summary judgment had to be brought. In support of their views, the defendants relied on the case of ***Belrex 95 CC v Barday***[12]. The plaintiff for its part argued that, in light of the fact that the plea was now different a further engagement with a plea was indicated and was not precluded by subrule (4).

[27] The Court noted in the ***City Square Trading 522 (Pty) v Gunzenhauser*** matter[13] that, while Rule 32 itself did not deal with what was to happen if there were an amendment to the plea, Rule 28(8), which was of general application, took account of the consequences of the amendment of pleadings generally. Rule 28(8) provides that *"A party affected by an amendment may, within fifteen days after the amendment has been effected or within such other period as the Court may determine, make consequential adjustment to the documents filed by him"*. The Court held deliberately inclusive, the only constraint here that the judgment should be *consequential*[14] on the amendment, failing which formal leave had to be sought in terms of subrule (1).

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[12] *Supra*

[13] *Supra*

[14] See paragraph 17 of the Judgment

[28] In the case of the amendment of the plea after the filing of a summary judgment application, the Court concluded the plaintiff was decidedly "*a party affected by the amendment*".[15] Thus, the provisions of Rule 28(8) apply to it and so afforded it the right to adjust the founding affidavit without leave, provided the adjustment was consequential. The consequential adjustment in that instance would be the amendment of the affidavit filed in terms of Rule 32(2)(a) to take account of the amendment. Rule 32(4) did not preclude such adjustment, Fisher J held.[16]

[29] The Court added that, as long as the adjustment was strictly consequential on the amendment, there was no reason why the affidavit although supplemented should not be read to conform to the description of the subrule (2)(a) affidavit.[17] In this regard the Court added that the fact that the further affidavit was necessary for the purpose of this adjustment did not change the nature and characterisation of the founding application.[18] Fisher J further held that:

> *"[28] In this context to interpret the rule so as to allow the amendment of the defence mid-summary judgment proceedings, but then to close the door in those proceedings to the engagement with the very inquiry which the rule requires, would make no sense.*
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> *[29] To my mind, rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which is of the nature of a reply or rejoinder to the defendant's case and which is not*

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[15] See paragraph 18 of the Judgment

[16] See paragraph 18 of the Judgment in the ***City Square*** matter *supra*

[17] See paragraph 19 of the Judgment

[18] ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another*** *supra* at paras 17-20

consequential on the amendment of the plea."[19]

[30] In paragraph 23 of the ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another***[20] Fisher J stated the following:

"[23] Preparatory to the possible amendment of the summary judgment procedure, the Board appointed a task team to investigate and consider whether rule 32 was fit for purpose. Pursuant to this process, the Board released a memorandum (the memorandum) dealing with proposed changes to rule 32 which had arisen out of the task team's consideration of rule 32.

[24] In the memorandum it was raised that the task team was of the opinion that the then existing summary judgment procedure was unsatisfactory in a number of respects. In para 3 of the memorandum it was said that the task team had raised the following main difficulties with the rule:

'3.1 Deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit — further affidavits not being permitted);

3.2 Opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for trial in due course; and

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[19] ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another*** *supra* at paras 28-29

[20] *Supra*

3.3 Burden of proof was arguably shifted to the defendant which was not only unfair but (sic) led to the kinds of constitutional challenges which have emanated in the High Court.'

[25] Central recommendations of the task team covered in the memorandum were that summary judgment should be applied for after the delivery of a plea or exception and that the application for supporting the summary judgment should not be the pro forma affidavit of the then existing rules, but should instead 'identify any point of law relied upon and explain briefly why the defence as pleaded does not raise any triable issues'.

[26] After dealing with various shortcomings which arose due to the formulaic approach to the founding affidavit in the then existing rule 32, the memorandum of the Board goes on to state as follows in relation to one of the main bases for the task team's recommendations:

'8.2 The best way of addressing these shortcomings would seem to be to ***require the founding affidavit in support of summary judgment to be filed at a time when the defendants defence to the action is apparent****;* ***by virtue of having been set out in a plea****. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit.'* (Emphasis added)

[27] It is thus clear from the memorandum that the main purpose of

the amendment to rule 32 was to avoid the formulaic approach of the old rule to the affidavit supporting a summary judgment application ***and to allow for proper engagement by the parties with the pleadings****."*[21]

[31] In the matter of ***Nqabeni Attorneys Incorporated*** the plaintiff/respondent and ***God Never Fails Revival Church*** (first defendant/applicant) and two others,[22] Sutherland J (as he then was) dealt with an interlocutory application. The applicants in that application were the defendants in an action instituted by the plaintiff who was the respondent in that application. The relief sought by the Church was in terms of Rule 30 of the Uniform Rules of Court and was aimed at setting aside a notice of bar filed by Nqabeni as an irregular step. The root of the controversy in that matter was the proper interpretation of Rule 22 and 28 of the Uniform Rules of Court, i.e. does a defendant have twenty days to respond to an amended declaration, relying on Rule 22(1) or fifteen days relying on Rule 28(8)?[23] Sutherland J in considering the aforementioned question posed *inter alia* held the following:

"[7] In order for an amendment to party "A" s pleading to "affect" the other party "B" in the way contemplated by Rule 28(8), the amendment has to result in "B" having an election to "….make any consequential adjustment to the documents filed by him……" If no "consequential adjustments" are possible, plainly the rule cannot apply. It must therefore follow that if party "B" has not already filed a document which might require "adjustment", then the rule is inapplicable.

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[21] ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another*** *supra* at paras 23-27

[22] ***Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others*** Gauteng Local Division, Johannesburg, Case No. 40739/2017 delivered on the 7th of March 2019

[23] ***Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others*** *supra* at paras 1 and 2

[8] *In this case, the exception filed by the church to the initial declaration in its unamended form, which is the only document of the church which has been filed, does not require any adjustment as it is redundant after the amendment, having served its purpose by provoking the amendment. Logically, only a plea to the declaration might attract the risk of requiring a "consequential adjustment". The term "adjustment" is well chosen because it implies an adaptation as a response to something that "affects" it; it cannot be a fresh initiative, such as a document filed for the first time. Frequently, a declaration is sought to be amended after a plea has been filed. The risk exists that the initial plea is non-responsive to the declaration in its amended form and in such a case, the defendant has 15 days to "adjust" its plea. That is not the position on these facts.*

[9] ***Accordingly, the provisions of Rule 22(1) apply to the time for delivering a plea for the first time, not those of Rule 28(8)****."*[24] (Own emphasis)

[32] In summary, Sutherland J held as follows:

"12.1 ***When a plaintiff accomplishes an amendment to a declaration, and no plea has yet been filed, the defendant is put on terms to comply with Rule 22(1) and thereby file a plea within 20 days****.*

12.2 *The scope of Rule 28(8) is limited to circumstances where an amendment creates the risk of a ripple effect on pleadings already filed, which risks rendering those pleadings non-responsive to the amended pleading, and for that reason may be in need of an adjustment to render them responsive.*

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[24] ***Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others*** *supra* at paras 7-9

[13] The result is that the notice of bar was irregular and must be set aside.

[14] The Order

(1) The notice of bar delivered on 28 June 2018 is an irregular step and is set aside.

(2) The plaintiff shall bear the costs of the application on the opposed scale." (Own emphasis)

[33] Accordingly having regard to the aforementioned case law, I find that the respondent had fifteen days from the date on which the applicant delivered his plea consolidating both the amendments on the 26th of July 2022 within which to deliver its notice of application for summary judgment.[25] The respondent delivered its application for summary judgment on the 17th of August 2022, being fifteen days after the date on which the applicant's plea consolidating both the amendments was delivered.

[34] I accordingly find that the respondent's application for summary judgment is not irregular and does not fall to be set aside in terms of the provisions of Rule 30.

[35] Mr Shull argued that the applicant will prejudiced if the relief setting aside the respondent's application for summary judgment is not granted, as the applicant will be forced to place its defence under oath and will be mulct with the costs involved in the summary judgment proceedings. I do not agree with this contention. The respondent in terms of the Rules of Court is entitled to launch an application for summary judgment. The Rule was designed to prevent a plaintiff's claim, based on certain causes

[25] The applicant accomplished his amendments on the 26th of July 2022 and accordingly the respondent had fifteen days from that date within which to deliver its notice of application for summary judgment in terms of the provisions of Rule 32

of action, from being delayed with what amounts to an abuse of the process of the Court.[26] The objective of the new Rule remains the same.

[36] The remedy provided by the Rule has for many years been regarded as an extraordinary and a very stringent one in that it closes the doors of the Court to the defendant and permits a judgment to be given without a trial. In ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture***[27] the Supreme Court of Appeal in holding that the time has perhaps come to discard labels such as *"extraordinary"* and *"drastic"*, stated:

> *"[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. …"*

COSTS

[37] The respondent seeks attorney client costs. Mr Shull argued that attorney and client costs is unfair in terms of certain Regulations as promulgated under the Consumer Protection Act.[28] Mr Peter argued that the National Credit Act[29] applies. I am, however, not inclined to grant attorney client costs against the applicant.

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[26] ***Meek v Kruger*** 1958 (3) SA 154 (T) at 159-60; ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) at 11C-G; ***Majola v Nitro Securitisation 1 (Pty) Ltd*** 2012 (1) SA 226 (SCA) at 232F-G; ***Eclipse Systems v He and She Investments (Pty) Ltd and a related matter*** 2020 (6) SA 497 (WCC) at para 10

[27] *Supra*

[28] Act 68 of 2008

[29] Act 34 of 2005

RESERVED COSTS OF THE 7TH OF SEPTEMBER 2022

[38] The applicant has requested the Court to award in its favour the reserved costs of the 7th of September 2022. On that day the application for summary judgment was set down to be heard. The matter was postponed on the 7th of September 2022 and the costs were reserved. The applicant's contention is that the application was set down prematurely on the basis that its Rule 30 notice delivered on the 23rd of August 2022 first had to be given adherence to prior to the summary judgment application proceedings. I find that the summary judgment application had been enrolled prematurely by the respondent and that the respondent is to pay the wasted costs of the 7th of September 2022.

ORDER

[39] Accordingly, I make the following order:

39.1 The applicant's application in terms of Rule 30 is dismissed with costs.

39.2 The applicant is to deliver his opposing affidavit in the application for summary judgment within 10 (ten) days from date of granting of this order.

39.3 The respondent is ordered to pay the costs of the 7th of September 2022.

M VAN NIEUWENHUIZEN
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 10 August 2023.

HEARD ON:	6 June 2023
DATE OF JUDGMENT:	10 August 2023

APPEARANCES:

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