

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 001/11 IEC

In the matter between:

**INKATHA FREEDOM PARTY**

Applicant

and

**THE ELECTORAL COMMISSION**

Respondent

**Neutral Citation:** *Inkatha Freedom Party v The Electoral Commission* (Case no 001/11 IEC) [2011] ZAEC 1 (20 April 2011)

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**J U D G M E N T**

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**MTHIYANE, JA:**

**INTRODUCTION**

[1] On 7 April 2011, I made an order (concurring in by Masipa J and Pillay J) reviewing and setting aside the decision of the respondent (the Commission), in which it refused to allow the applicant, Inkatha Freedom Party, to submit its necessary documentation in terms of sections 14(1)<sup>1</sup> and 17(1) and (2)<sup>2</sup> of the Local Government: Municipal Electoral Act 27 of 2000 (the Act) and the Commission's refusal to place on the final list of candidates for the Umzumbe local government elections the names of the applicant's

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<sup>1</sup> Section 14(1) reads as follows:

**'14. Requirements for parties contesting election by way of party lists.**

- (1) A party may contest an election in terms of section 13 (1) (a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission's local representative—
- (a) in the prescribed format and signed by the party's duly authorised representative—
- (i) a notice of its intention to contest the election;
  - (ii) a party list;
  - (iii) an undertaking binding the party, its candidates, persons holding political or executive office in the party, its representatives, members and supporters, to the Code; and
  - (iv) a declaration that none of the candidates on the party list is disqualified from standing for election in terms of the Constitution or any applicable legislation; and
- (b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.'

<sup>2</sup> Section 17(1) and (2) reads as follows:

**'17. Requirements for ward candidates to contest election.**

- (1) A person may contest an election as a ward candidate only if that person is nominated on a prescribed form and that form is submitted to the office of the Commission's local representative by not later than a date stated in the timetable for the election.
- (2) The following must be attached to a nomination when it is submitted:
- (a) In the case of an independent ward candidate, a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward;
  - (b) a prescribed acceptance of nomination signed by the candidate;
  - (c) a copy of the page of the candidate's identity document on which the candidate's photo, name and identity number appear;
  - (d) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission;
  - (e) a prescribed undertaking, signed by the candidate, to be bound by the Code; and
  - (f) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation.'

candidates for the various wards specified in the nomination forms which the applicant sought to lodge with the Commission. In paragraph 4 of that order, it was indicated that reasons for it would be furnished in due course. The purpose of this judgment is amongst other things to furnish reasons for that order.

### WHAT THIS CASE IS ABOUT

[2] This case is concerned with the interpretation of sections 14 and 17(1) and (2) of the Act, dealing with requirements for parties contesting the elections by way of party lists, and requirements for ward candidates to contest elections, respectively. The question raised in this application is whether, to the extent that sections 14 and 17 of the Act state that the documentation referred to in section 14 and the list of nominated candidates referred to in section 17 are to be submitted 'to the Commission's local representative' by not later than a date stated in the timetable for the election,<sup>3</sup> this is a peremptory provision that prevented a party or candidate from submitting the said documents or list at any other office of the Commission, including its central or national office.

### THE APPLICATION

[3] The applicant lodged an application to this Court on notice of motion seeking two forms of relief. The first form of relief is leave to appeal against the decision of the Commission taken on 25 March 2011, refusing to allow the applicant to submit its

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<sup>3</sup> 2011 Election Timetable, Government Notice 134 of 2001, Government Gazette 33114.

necessary documentation in terms of sections 14(1) and 17(1) and (2) of the Act at the Commission's Durban offices and to place on the final list of the candidates for the Umzumbe local government elections the names of candidates nominated by the applicant to stand for the election on 18 May 2011. The second and alternative form of relief is a review. The applicant seeks an order reviewing and setting aside the aforesaid decision of the Commission taken on 25 March 2011.

[4] The application was filed and served on the Commission on 30 March 2011. In terms of rule 6(2) of the Rules of this Court it had to respond within three days from said date, that is, by not later than 4 April 2011. It did not do so and has not filed any papers in opposition. Given the Commission's letter from the Chief Electoral Officer dated 28 March 2011, I proposed to deal with the matter as though it were opposed. The letter was addressed to the applicant's attorneys and indicates the Commission's attitude to the applicant's pre-application overtures to get the Commission to change its decision. Although the letter is filed of record with the rest of the papers it is marked 'without prejudice'. It is not clear whether the intention was that the letter should form part of the proceedings or not. I do, however, think that it would do more harm to the Commission's cause if this matter were disposed without regard to the legal argument advanced by the Commission in the said letter. I will therefore assume in favour of the Commission that whatever privilege attached to the letter has been waived.

[5] The argument advanced by the Commission as it appears in the letter is the following:

'The provisions of sections 14 and 17 of the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000), read with the Election Timetable published on 11 March 2011, required notices of intention to contest [the election] and other supporting documents to be submitted no later than 17h00 on 25 March 2011, "to the offices of the Commission's local representative".

The systems and processes of candidate nomination in local government elections are similarly configured in a manner that only allows capturing of information at that local level. Documents and information for each municipality are therefore to be processed in that municipality, save for central payment of deposits. It is in this regard that parties were urged to start submitting their documents from the 11<sup>th</sup> of March 2011 and not wait for [the] closing date and time.

The wording in these sections are explicitly peremptory and do not allow the EC to implement them differently or expansively. Accordingly, the documents of the IFP [that is the applicant] in this municipality cannot be accepted post the set date and time.'

## THE FACTS

[6] In order to put the matter in the proper context, it is necessary to briefly sketch the relevant facts. The applicant intended contesting numerous elections in the upcoming local government elections. To this end, it compiled relevant documentation that was required for submission to each municipality it wished to contest. The applicant timeously caused it to be collated and placed into separate marked envelopes for delivery to the offices of the relevant local representatives of the Commission before the stipulated deadline.

[7] In the case of Umzumbe Municipality, two envelopes were prepared:

- (a) One which contained all the relevant documentation required for proportional representation (PR) candidates in terms of section 14(1) of the Act, including inter alia the applicant's party list (which listed 32 candidates), and the notice to contest the election; and
- (b) Another containing all the relevant documentation for the ward candidates in terms of section 17(1) and (2) of the Act, including the nomination forms for 19 ward candidates, their acceptances thereof, their ID documents, and their undertakings to be bound by the Code<sup>4</sup> and a declaration that they were not disqualified from standing for election.

[8] Through an administrative error in the applicant's offices, the two envelopes containing documentation destined for Umzumbe Municipality were inadvertently mixed up with documentation and candidates list destined for the Gauteng area. When the applicant's official, Mr Peter Smith, who was responsible for the mix up, realised what had happened, attempts were made to courier the documents back to Durban for transportation to Umzumbe. The courier company could only get the documents on to a 2:00 pm flight back to Durban's King Shaka Airport, which meant that they could only be in Durban at 3 pm.

[9] Realising that this would leave the applicant with insufficient time to get the documents by road transportation to Umzumbe by 5:00 pm, a local helicopter company

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<sup>4</sup> That is the Code of Conduct agreed to by and between the Commission and the political parties.

was commissioned to fly the documents to Umzumbe. The applicant was assured that it would only take 20 minutes to get the documents to Umzumbe.

[10] After the documents arrived from Johannesburg, the courier company delivered the envelopes containing the documents to the helicopter at Virginia airport. The carefully laid plans were however dealt a blow, when a storm started in the mid to late afternoon in Durban. It became apparent that the storm would not lift in time to allow the helicopter to take off. When the helicopter pilot realised this, he called Mr Narend Singh, the applicant's deponent to this application, at approximately 4:25 pm advising him that the storm had grounded the helicopter and that they would not be able to take off.

[11] The events that followed are described by Mr Singh as follows:

'I immediately called Mr Mawethu Mosery ("Mosery"), KZN's provincial electoral officer of the Commission, to advise him of the position, and to enquire what could be done to ensure that the documents were filed with the Commission timeously. I advised him that it would not be possible to drive the documents to the Commission's representatives in Umzumbe by 5pm

Mosery advised me that, notwithstanding the extenuating circumstances, it would not be permissible for the IFP to attempt to deliver the documentation to the Durban representatives of the Commission.

From Virginia airport it would have taken approximately 10 minutes to deliver the documents to the Durban offices of the Commission. Thus had the Commission allowed us to file in Durban we would have been able to do so before 5pm.

I should point out that the IFP had already paid the required deposit to contest the Umzumbe Municipal election at 12pm on 25 March 2011 to the Commission. I attach hereto a copy of the cheque and accompanying documentation, marked "**NS4**". I point out

that Umzumbe is clearly listed as one of the local municipal elections that the IFP would be contesting.

One Mosery advised me that the Commission refused to accept submission of documents in Durban, the IFP immediately sought to make an alternative arrangement. This arrangement was in response to the suggestion from Mosery to me that the IFP should instruct its local representatives in Umzumbe to fill out a relevant party list and to submit it in the place of the documents that were awaiting delivery at Virginia airport.

I thereafter immediately contacted the IFP's local representative MR Thembinkosi Mandla Khuzwayo ("Khuzwayo"). On my instructions he immediately arranged with the local representatives of the Commission to be given registration forms and managed to fill in forms on behalf of himself and two other representatives of the IFP (being Zamakhosi Shozi ("Shozi") and Nonhlanhla Mpisane ("Mpisane")). Mr Khuzwayo listed himself as a ward candidate and as a PR candidate, and Shozi and Mpisane as PR candidates. This documentation ("the emergency documentation") was submitted to the Commission as aforesaid, and the IFP therefore does not have copies thereof in its possession, but the Commission will be in possession thereof.

Mosery subsequently advised me that the Commission's local representatives in Umzumbe accepted the emergency documentation which was filed just before the 5pm deadline.

Obviously, since the remaining original documentation was stranded in Durban on account of bad weather, no further documentation could be delivered in time.

Given the uncertainty as to what approach the Commission had taken, and whether it intended to allow the IFP to contest the Umzumbe elections, the IFP contacted the IFP's legal representatives and consultations were held with them urgently over the weekend.

Pursuant thereto an urgent letter was sent by the IFP's attorneys to the Commission's head office by fax at 3.43pm on Sunday afternoon 27 March 2011. I attach a copy hereto marked annexure "NS5" together with proof of transmission. The contents thereof are self-explanatory.

Given the urgency, the Commission was requested to respond by 4 pm on Monday 28 March 2011, failing which they were advised that we would be forced to take steps to approach this Honourable Court.’ (Paragraph numbers omitted.)

### APPEAL OR REVIEW

[12] Before turning to the issues for determination in this Court to dispose of the question whether this matter should be disposed of by way of appeal or by way of review. In terms of rule 2 of the Rules of this Court, its business is conducted in a manner determined by it and at times and places determined by the Chairperson ‘with due regard to the need for the expeditious disposal of matters’. The key aspect to consider in this matter was one of urgency. On the facts of this case, the alternative relief claimed by the applicant (review application) is one that allowed for more ‘expeditious disposal’ of the matter, as contemplated in rule 2, than the appeal procedure, which involves a two-stage process of leave to appeal and thereafter the appeal itself.<sup>5</sup> It was therefore considered to be in the interests of justice to deal with the matter as a review application. In any event, the applicant laid a sufficient basis for the matter to be dealt with as a review and it is within this court’s power to do so.<sup>6</sup>

### ISSUES FOR DETERMINATION BY THIS COURT

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<sup>5</sup> See rule 5 of the Rules of this Court published in GG No. 1898 Vol. 395 under notice 794 of 1998 on 15 May 1998.

<sup>6</sup> See Section 20(1) (a) of the Electoral Commission Act 51 of 1996

[13] The fundamental issue for determination in this case is whether, to the extent that sections 14 and 17 of the Act provide that the documentation referred to therein and the list of nominated candidates are to be submitted ‘to the Commission’s local representative’ by not later than a date stated in the timetable for the election, this is a peremptory provision that prevented the applicant or its candidates from submitting the said documents or its list at the Commission’s Durban office.

#### THE PROPER APPROACH TO THE INTERPRETATION OF SECTIONS 14 AND 17 OF THE ACT

[14] In *African Christian Democratic Party v Electoral Commission (ACDP)*,<sup>7</sup> the Constitutional Court had to consider whether, to the extent that sections 14 and 17 state that the payment of a deposit was to be made at the local government office, this was a peremptory provision that prevented the Commission from providing an alternative location for payment, in that case the National Office of the Commission. The Court answered this question in the negative. It reasoned that the purpose of section 14 (and section 17) was to ensure that a deposit is paid by a political party (or ward candidate) to establish that they have a serious intention to contest the election. It was held that there was no central legislative purpose attached to the precise place where the deposit is to be paid. The Court further said that—

‘to interpret sections 14 and 17 in a manner which prohibits the Commission from making such a facility available to political parties would be to read the provision unduly narrowly

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<sup>7</sup> 2006 (3) SA 305 (CC).

and to misunderstand its central purpose. In effect, what the Commission did, after consulting with the Party Liaison Committees, was to make an additional method of payment available to parties in a manner which facilitated their participation in the elections. Many parties took advantage of this system. In so doing, the Commission did not offend the intention of the legislature in requiring the payment of deposits as stipulated in sections 14 and 17 of the Municipal Electoral Act.<sup>8</sup> (Footnotes omitted.)

[15] In the present matter, sections 14 and 17 provide for the submission of documents and lists of nominated candidates ‘to the office of the Commission’s local representative’ by not later than a date stated in the timetable for the election. The *ACDP* case dealt with the payment of a deposit at a venue other than that prescribed in sections 14 and 17 of the Act. The present application is concerned with the submission of documents and lists to a venue (the Commission’s Durban office) other than the ‘office of the Commission’s local representative’ (Umzumbe) by not later than a date stated in the timetable for the election. In my view, there is no difference in principle between the two situations. I suggest that the principle laid down by the Constitutional Court in the *ACDP* case in respect of the payment of the deposit by parity of reasoning applies with equal force to the submission of documents. Interpreting and applying sections 14 and 17 so as to allow submission of documents in Durban rather than Umzumbe, given the unforeseen emergency, would not have offended against the central purpose of the sections. Similarly, there seems to be no central legislative purpose attached to the precise place where in a province the relevant documentation is submitted to the Commission. Indeed, it seems likely that the documents, once submitted in far-flung municipalities such as Umzumbe, will in all likelihood be transported to central provincial and/or national

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<sup>8</sup> Id at para 27.

locations for processing – which highlights the fallacy of the Commission’s refusal to accept the submission of the documents at its Durban office. The refusal to accept the documentation was not only obstructive, notwithstanding the untoward circumstances in which the applicant found itself, which were caused amongst other things by a superior force (*vis major*), but involved an unduly narrow reading of the provisions of sections 14 and 17, and a misunderstanding of the central purpose of the provisions.

[16] In the *ACDP* case, O’Regan J decribed the underlying statutory purpose of sections 14 and 17 as being to ensure that candidates and political parties contesting the elections declare their intentions to do so by a certain date and provide the Electoral Commission with the necessary information to enable them to organise the elections.<sup>9</sup> The payment of an electoral deposit ensures that the participation of political parties and candidates in the elections is not frivolous. The payment of the deposit is complementary to the key notification required for organising the elections, namely the notification of intention to participate and the furnishing of details of candidates. From the facts, the applicant clearly indicated its intention to contest the elections prior to the 5:00 pm cut-off time. It did this by first paying the deposit indicating that its intention was not frivolous. Secondly, it telephonically advised the Commission’s head official in the province (and this has not been denied) when it became clear that there may be difficulty in lodging the documents. Lastly, the applicant was willing and able to provide the Commission at its Durban office with all the necessary information or (in addition to what the Commission already knew) so that it could organise the elections.

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<sup>9</sup> Id.

[17] It bears mention that sections 14 and 17 of the Act are connected with a right to participate in an election, which right is entrenched in section 19 of the Constitution,<sup>10</sup> embodying the Bill of Rights. In interpreting these provisions, one must have regard not only to the underlying statutory purpose but also to the constitutional imperative of allowing access to free political participation in an open and democratic society.<sup>11</sup> Section 39(2) of the Constitution explicitly states that, when interpreting any legislation, ‘every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’. On the proper approach to interpreting these provisions, O’Regan J eloquently made the point as follows in the *ACDP* case:

[The foundational values of the Constitution] require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. The exercise, however, remains one of interpretation.<sup>12</sup>

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<sup>10</sup> Section 19 of the Constitution reads as follows:

**19. Political rights.**

- (1) Every citizen is free to make political choices, which includes the right—
  - (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right-
  - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.’

<sup>11</sup> On purposive interpretation, see *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paras 21-22; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), at para 91.

<sup>12</sup> *ACDP* above n 6 at para 23.

[I]n approaching the interpretation of provisions of electoral legislation, courts and the Electoral Commission must understand those provisions in the light of their legislative purpose within the overall electoral framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.<sup>13</sup>

To follow the narrow approach which the Commission appears to have adopted by refusing to accept the documentation would result in the disenfranchisement of not only the applicant but the candidates it nominated, in violation of the provisions of section 19 of the Constitution, with the concomitant potential for violence, especially in the province of KwaZulu-Natal, when people might feel that they being participation in an election.

[18] The Commission has been on record since the registration process to invite as many South African citizens as possible to register as voters so as to allow as much participation as possible. The stance adopted by the Commission in this case, in refusing to accept the relevant documents and the applicant's list of candidates, appears to be completely out of kilter with the nationwide invitation for participation in an election. The official concerned in the impugned decision, which decision has been adopted and supported by the Commission, appears to place form above substance, especially with regard to section 14 – something that our courts, including the Constitutional Court, have set their faces against.<sup>14</sup> I have counted six things that are required to be submitted to the Commission in terms of section 14: a notice of intention to contest an election

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<sup>13</sup> Id at para 34.

<sup>14</sup> See, for example, *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) at para 58; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 97; *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) at para 14; *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para 26; and *Shaikh v Standard Bank of SA Ltd and Another* 2008 (2) SA 622 (SCA) at para 18.

(14(1)(a)(i)); a party list (14(1)(a)(ii)); a deposit (14(1)(b)); separate party lists where an election is to be contested in more than one district management areas (14(2)); a prescribed acceptance of nomination (14(3)(a)); and a certified copy of that page of the candidate's identification document signed by each party's candidate (14(3)(b)). In the case of the applicant, all of these were available for submission to the Commission at its Durban office. Accordingly, the only real objection can therefore be as to form rather than substance.

[19] The suggestion that the applicant waited until the last minute to file its documents and candidates list is of no moment. The evidence (as it appears from the papers) shows that the applicant took all reasonable steps to get the documentation and candidates list to the Commission well before the deadline. These documents and the candidates list were tendered in good time at the Commission's Durban office but the Commission refused to accept them. That ultimately is what prevented the items from being in the Commission's possession before the cut-off time. The Commission insisted that the documents and candidates list be presented at its Umzumbe office where the capturing of information was to be done. This was in my view an inflexible attitude, contrary to the spirit and purport suggested by the Constitutional Court in the *ACDP* case, which called for the Electoral Commission and the courts involved in electoral matters to strive for enfranchisement rather than disenfranchisement in the interpretation of sections 14 and 17 of the Act. Had the Commission embraced this approach, it could have received the two envelopes containing the relevant documentation and candidates list at its Durban office well before 5:00 pm on 25 March 2011, opened the envelopes, and passed the

information contained therein to its Umzumbe office. That would have been the end of the matter. After all, what was required at Umzumbe was 'information', not hard copies of the documentation and candidates list. That is what the letter from the Chief Electoral Officer says in the second paragraph, where it speaks of 'capturing information'. Clearly, the refusal appears to have been informed by form rather than substance, an aspect which I have already addressed in some detail in this judgment.

[20] I have already dealt in some detail with section 17 when I addressed the refusal by the Commission to accept documentation and the applicant's list of candidates at the Commission's Durban office, and why this was misguided. It plainly did an injustice to the right to stand for public office and to the applicant's participation in the local government elections, and accordingly fell foul of the provisions of section 19 of the Constitution. If a party has complied in substance with the applicable provisions, having served the purpose of the provisions, they ought not to be precluded from participation in an election. The Commission cannot adopt a literal or technical interpretation (as it appears to have done here) if it would result in a violation of a party's rights under section 19 of the Constitution.

### ORDER

[21] For the above reasons, the Commission's decision cannot be sustained and fell to be set aside and replaced with an order which I made on 7 April 2011 with the concurrence of my colleagues (Masipa J and Pillay J), which reads as follows:

1. The decision of the Respondent, The Electoral Commission, on 25 March 2011, refusing to allow the Applicant, Inkatha Freedom Party, to submit its necessary documentation in terms of Sections 14(1) and 17(1) and (2) of the Local Government: Municipal Electoral Act 2000, at the Respondent's Durban offices, is reviewed and set aside.
2. The Respondent is ordered to:
  - (a) allow the Applicant to forthwith file all its relevant documentation as set out in prayer 1(a) with the Respondent;
  - (b) forthwith place Applicant's name on the list of registered parties entitled to contest the Umzumbe local government election;
  - (c) forthwith place the names of Applicant's candidates for the various wards, as per the ward nomination forms attached as Annexures "NS3(a)" to "NS3(s)" to the founding Affidavit, on the final list of candidates of the Umzumbe local government election;
  - (d) ensure that all ballot papers printed reflecting the result of the orders set out above, alternatively to extent that ballot papers have already been printed, to print forthwith ballot papers reflecting the result of the orders set out above.
3. There will be no order as to costs.
4. The reasons for this order will be filed with the Registrar of this court in due course.'

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**MTHIYANE JA**

**CHAIRPERSON: ELECTORAL COURT**

**CONCURRED:**

**MASIPA J**

**PILLAY J**

**Date: 20 April 2011**

For the Applicant:

Lourens De Klerk Attorneys.

For the Respondent:

Lovius Block Attorneys.