THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 446/13

In the matter between:

MAGISTRATE M PANGARKER **Appellant**

and

ARNOLD BOTHA **First Respondent**

CHRISTINA MAGDALENA BOTHA **Second Respondent**

Neutral citation: *Magistrate M Pangarker* v *Botha* (446/13) [2014] ZASCA 78 (29 May 2014)

Coram: Mthiyane DP, Lewis, Mhlantla and Wallis JJA and Legodi AJA

Heard: 6 May 2014

Delivered: 29 May 2014

Summary: Civil Procedure – review of divorce proceedings – no gross irregularity was committed by the regional magistrate for not postponing the trial *mero motu* and proceeding with the divorce trial in the absence of the first respondent – orders of the high court set aside.

ORDER

On appeal from: Western Cape High Court, Cape Town (Goliath J and Cloete AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The first respondent is ordered to pay the costs of appeal.

3 The order of the high court is set aside and replaced with:

'The application is dismissed with costs.'

JUDGMENT

Mhlantla JA (Mthiyane DP, Lewis and Wallis JJA and Legodi AJA concurring):

[1] This appeal arises from the divorce proceedings in the Southern Divorce Court between the first respondent (Mr Arnold Botha) and the second respondent (Mrs Christina Botha). The proceedings came before magistrate M Pangarker, (the appellant) an acting regional magistrate at the Regional Court, Western Cape. For the sake of convenience, I shall refer to the appellant as the magistrate. In circumstances that will be described later, the divorce trial proceeded in Mr Botha's absence. A divorce order was granted together with an order for the partial forfeiture of the benefits of the marriage. Mr Botha then launched an application in the Western Cape High Court, Cape Town to review and set aside the proceedings and the judgment.

[2] The high court (Goliath J and Cloete AJ) upheld the application for the review of the divorce proceedings between Mr and Mrs Botha. Save for the decree of divorce, the high court set aside the proceedings as well as the judgment issued by the magistrate. It ordered that the matter be referred back to the regional court for trial *de novo* before a regional magistrate other than the appellant. Regarding costs, the magistrate and Mr Botha were ordered to pay Mrs Botha's costs jointly and severally on the scale as between party and party. Furthermore, they had to bear their own costs in the review application. The magistrate appeals against this decision with the leave of this court.

[3] This appeal turns on two issues. First, whether the magistrate committed a gross irregularity by not postponing the trial *mero motu* and proceeding with the trial in the absence of Mr Botha when she was aware that the attorney he wished to engage was not available on the days allocated for the hearing. Mr Botha alleged that his rights to be heard and to be afforded a fair trial were violated. Second, whether, in the event that this constituted a gross irregularity, the magistrate should be held liable for the costs of the review application in her personal capacity.

Background

[4] This dispute commenced in August 2008 when Mr Botha, who was married to Mrs Botha out of community of property in terms of an antenuptial contract, instituted a divorce action against her in the Southern Divorce Court,

Cape Town. The divorce action was opposed by Mrs Botha who was represented by Werksmans Attorneys, whilst Mr Botha was represented by different attorneys. The divorce proceedings came before the magistrate and the matter was postponed on numerous occasions, either to allow Mr Botha to engage a new legal representative or to enable the attorney concerned an opportunity to apprise himself or herself of the facts of the matter.

[5] It is apposite at this stage to outline the history of Mr Botha's legal representation. Initially, he was represented by Mr Vermaak, an attorney. A dispute arose between him and his attorney. During November 2009, Mr Botha terminated his mandate.

[6] In December 2010 Mr Botha instructed Mr Jennings to act for him. The case was enrolled for trial on 12 August 2011,which gave him about eight months to prepare for trial. Unfortunatetly, Mr Jennings did nothing towards preparation for the trial. Mr Botha reported the attorney to the Law Society only to discover that Mr Jennings had been interdicted from practising as an attorney. He immediately terminated his mandate. On 12 August 2011 Mr Botha appeared in court without a legal representative. The trial was postponed to 21 October 2011 to enable him to engage a new legal representative.

[7] Due to lack of funds he approached the Law Society for assistance: Mr Gert Etzebeth, an attorney, was appointed to act for him on a *pro bono* basis. On 21 October the case was again postponed to 15 December 2011 to allow Mr Etzebeth to prepare for trial. Mr Botha alleged that Mr Etzebeth did nothing to

prepare for the case and did not contact him. During November 2011, he contacted Mr Etzebeth and made an appointment. They consulted on 1 December 2011. He sought an amendment of his particulars of claim, to deal with the issue of his wife's claim for forfeiture of patrimonial benefits. He and Mr Etzebeth could not agree on the procedure. This led to the withdrawal of Mr Etzebeth as attorney of record. A notice of withdrawal was filed on 6 December 2011, a few days before the trial date. Mr Etzebeth explained the grounds for his withdrawal in an email to Mrs Botha's attorney as being that 'Mr Botha does not understand what it is to conduct a trial. His judgment is clouded, therefore we are unable to make him see what is required.'

[8] On 15 December 2011, Mr Botha appeared in person. He applied for a postponement of the trial. The case was postponed to 8 and 9 March 2012. This was a third postponement at his instance. The magistrate ordered that this would be a final postponement and that the matter would proceed on those days whether Mr Botha had legal representation or not. This was at the request of Mrs Botha, who only reluctantly conceded that an adjournment should be granted. A pre-trial conference was set down for 22 February 2012. Mr Botha was ordered to pay the wasted costs occasioned by the postponement.

[9] Mr Botha thereafter approached the Law Society, which appointed Ms Davidson to act on a *pro bono* basis. Her appointment took effect on 25 January 2012. Ms Davidson arranged for an advocate, Mr Heese, to represent Mr Botha. They represented him at the pre-trial conference on 22 February but he was dissatisfied with their approach at the conference. He formed the view that the

magistrate was biased against him and was referred to the Department of Justice and Constitutional Development to whom he made a complaint. This apparently came to the attention of Ms Davidson who was left with the impression that Mr Botha was accusing her of being incapable of handling his case. This lead her to withdraw as his attorney of record.

[10] Thereafter, Mr Botha approached numerous attorneys to assist him. On 28 February 2012 Mr Derris accepted instructions to act for him. Mr Derris, however, was not available to attend to the trial on 8 March and informed Mr Botha accordingly. Mr Derris undertook to apply for a postponement of the trial. In this regard he communicated directly with the magistrate, without reference to Mrs Botha, by telephoning the magistrate and writing to her. He sought the court's indulgence for a short postponement. Mr Derris requested the court not to deny Mr Botha the right to legal representation. The magistrate quite properly referred these communications to Mrs Botha's legal representative and made it clear that she would not entertain *ex parte* communications. Mrs Botha was not amenable to a further postponement and indicated that she would oppose any application to that effect.

[11] The magistrate responded to Mr Derris' email and request for a postponement, and stated:

'There is now a request by Mr Derris that the legal representatives see me in chambers to reach some amicable solution regarding a postponement of the matter on the 8th. Note that as both parties are represented, I can and will only see all the representatives together by prior arrangement.

If any party is unhappy with my presiding in the matter, as I advised in last week's email to Ms Davidson, and earlier to Mr Derris, a formal application for my recusal from the matter would have to be brought in court.

The matter cannot be enrolled for an earlier date to deal with a potential postponement by Mr Botha or Mr Derris on his behalf as I am in Court everyday, in various Regional Courts, as well as my colleague Mr Yuill.'

[12] Mr Derris did not respond to this email. He did not make any attempts to engage Mrs Botha's attorneys with a view to reaching an agreement on the postponement of the trial. There is no reason to doubt that the magistrate and her colleague were not available to hear an application for a postponement prior to 8 March due to their court engagements.

[13] On 8 March 2012, Mr Botha appeared in court without a legal representative. He launched an application for the recusal of the magistrate that had been served electronically on her and Mrs Botha the previous afternoon.
He informed the magistrate that on Mr Derris' instruction, he would read the recusal application into the record and then leave the court without answering any questions. Prior to him doing so, the magistrate explained the potential consequences of absenting himself from the proceedings. In this regard, she stated that the counsel representing Mrs Botha would be allowed to present her argument in opposition and that due to his absence there would be no replication from him; the trial would be postponed in the event the application for her recusal was granted. However, in the event of a refusal, Mrs Botha could request that the divorce action proceed on her plea and counterclaim and she as the

magistrate might continue with the trial in his absence and finalise the divorce proceedings without hearing his side of the case.

[14] Mr Botha confirmed that he understood the potential consequences and that Mr Derris had advised him that in the event of the matter proceeding in his absence, he would deal with it on his return from Johannesburg. The magistrate furthermore invited him to remain in court and sit in the gallery as an observer. He declined that invitation. Mr Botha thereafter read the application into the record and then left the court. At no stage did he make a formal application for the postponement of the trial. Mrs Botha's counsel opposed the application for the magistrate's recusal and made submissions in that regard. The recusal application was dismissed with costs. In the high court it was conceded that the recusal application was devoid of merit.

[15] The divorce trial commenced in the absence of Mr Botha. The testimony of Mrs Botha and an expert valuer, in respect of the immovable property in which the parties lived, was adduced. On 9 March 2012 neither Mr Botha nor Mr Derris appeared in court. The magistrate handed down judgment and granted a decree of divorce. A partial forfeiture order in terms of s 9 of the Divorce Act 70 of 1979 was granted in favour of Mrs Botha. Mr Botha was ordered to pay the costs of the action.

[16] Aggrieved by the outcome, Mr Botha launched an application in the high court. He sought an order reviewing and setting aside the divorce proceedings that took place on 8 and 9 March 2012 as well as the judgment issued by the

magistrate on 9 March 2012. The review application was based on the ground that the magistrate had continued and finalised the divorce proceedings in his absence and as a consequence had violated his right to be heard and to legal representation as enshrined in the Constitution.

[17] The high court upheld the application. It found that the magistrate had implicitly refused to grant a postponement in her email response to Mr Derris. It concluded that the magistrate should have *mero motu* postponed the matter to enable Mr Botha to obtain a legal representative of his own choice and that failure to do so resulted in him not getting a fair trial. It further held that it was grossly irregular for the magistrate simply to decide to proceed with the matter without considering the issue of the postponement and that it was unreasonable to deny Mr Derris an opportunity to facilitate a postponement of the matter. The high court thus concluded that the magistrate had committed a gross irregularity by not postponing the matter and refusing Mr Botha a legal representative of his own choice. It accordingly set aside the proceedings. The high court ordered that the divorce action and in particular the question relating to the claim for forfeiture of benefits be dealt with afresh before a different magistrate. The magistrate and Mr Botha were ordered to pay Mrs Botha's costs.

[18] On appeal it is accordingly necessary to determine whether a failure to consider a postponement *mero motu* constituted a gross irregularity sufficient to ground a review application.

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Grounds of review

[19] Section 24 of the Supreme Court Act 59 of 1959[1] outlines the grounds upon which the proceedings of inferior courts may be brought under review before a provincial division as follows:

‘24 Grounds of review of proceedings of inferior courts

(1) The grounds upon which the proceedings of an inferior court may be brought under review before a provincial division or before a local division having review jurisdiction, are –

(a) . . . ;

(b) interest in the cause, bias, malice or the commission of an offence . . . on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) . . .’

Interest in the cause, bias or malice

[20] At the commencement of the appeal, Mr Botha’s counsel confirmed that a concession had been made in the high court that there was no merit in the recusal application and that such application was correctly dismissed. It follows that the only issue on appeal relates to the finding of the high court that the magistrate had committed a ‘gross irregularity’.

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1 Now s 22 of the Superior Courts Act 10 of 2013.

Gross irregularity

[21] Van Loggerenberg *et al*[2] interpret the 'gross irregularity' ground of review to refer to 'an irregular act or omission by the presiding judicial officer . . . in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice'.

Legal Principles in respect of postponements

[22] A starting point is Rule 31(1) of the Magistrates' Court Rules which provides:

'The trial of an action or the hearing of an application or matter may be adjourned or postponed by consent of the parties or by the court, either on application or request or of its own motion.'

[23] Where a postponement is sought, it is determined at the court's discretion. A party seeking a postponement must demonstrate 'a full and satisfactory explanation of the circumstances' grounding the indulgence'.[3] A

2 DE van Loggerenberg, PBJ Farlam, MJ Bishop & JR Brickhill: *Erasmus: Superior Court Practice* (2013) at A1-71

3 DE van Loggerenberg *Jones and Buckle: Civil Practice of the*

magistrate is empowered to grant a postponement *mero motu* where the 'circumstances justify it and the further time required by the applicant is fully and adequately explained [and] refusal of the postponement should lead to an injustice being done to the party seeking it'. In *Momentum Life Assurers Ltd* v *Thirion*[4] the court outlined the circumstances under which such an order may be granted:

'Rule 31(1) clearly provides for an unfettered judicial discretion by furnishing the magistrate with the power to adjourn or postpone a matter *mero motu*. There is no suggestion that he may exercise this power only under prescribed circumstances. There may, in fact, be any number of reasons for his decision to follow this route. It may be for personal reasons or in response to the demands of public interest, for example as a result of the state of the court roll or because of an emergency situation. An unassailable reason would be if it should appear to be in the interests of justice that he do so.'

[24] Van Zyl J in *Thirion* said:[5]

'Of course no court would feel the urge to come to the assistance of a litigant who has been the author of his own misfortune and has suffered injustice by his own conduct. Cognisance must, therefore be taken of all the relevant facts and circumstances giving rise to such misfortune and injustice. If he has been careless, dilatory or in bad faith (*mala fide*), he cannot expect the courts to come to his assistance.'

Magistrates' Courts in South Africa (2013) at 31-2.

4 *Momentum Life Assurers Ltd* v *Thirion* [2002] 2 All SA 62 (C) paras 16-22 and 25 [5] At para 34.

[25] The legal principles governing the grant and refusal of postponements are well-established. In *Carephone (Pty) Ltd* v *Marcus NO and Others,*[5] Froneman DJP held:

'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice.'

[26] In *Take and Save Trading CC* v *Standard Bank of SA Ltd,*[6] Harms JA said:

'One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.'

[27] The Constitutional Court held in *Lekolwane & another* v *Minister of*

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5 *Carephone (Pty) Ltd* v *Marcus NO & others* 1999 (3) SA 304 (LAC) para 54.

6 *Take and Save Trading CC* v *Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 3.

Justice and Constitutional Development:[7]

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this court is satisfied that it is in the interests of justice to do so. In this respect the application must ordinarily show that there is good cause for the postponement, whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest.'

[28] It is against this background that I proceed to consider the issues in the appeal, commencing with the question whether the magistrate was obliged to postpone the trial *mero motu* after refusing the recusal application. The enquiry requires us to consider any prejudice suffered by the parties, the history of the proceedings, Mr Botha's numerous struggles with his legal representation and the circumstances and competing rights of Mrs Botha.

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7 *Lekolwane & another* v *Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17. See also *National Police Service Union* v *Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112C-F.

[29] Counsel for Mr Botha submitted that the magistrate should have postponed the trial. This argument is devoid of substance and falls to be rejected. The approach by the magistrate was appropriate under the circumstances and she acted properly. She was faced with a trial that had already been postponed three times to accommodate Mr Botha and Mrs Botha clearly wished to achieve finality. She considered what was fair to both parties, including the possibility of a postponement, and decided that the matter should proceed. The record shows that she deliberated anxiously before reaching that decision. Her conduct cannot be faulted.

[30] The judgment of the high court in finding that the failure to postpone the trial constituted a gross irregularity is disturbing as it is not supported by the facts. First, the high court erred when it interpreted the magistrate's response to Mr Derris as a refusal to grant the postponement. She merely indicated that there were only two magistrates presiding in the divorce court and their roll was full. The attack is further unjustified as all she did was to explain the state of affairs in that court. Nothing prevented Mr Botha and his legal representative (either Mr Derris or another attorney) from launching a formal application for a postponement on the first day of the trial or an urgent application for a postponement. They did not do so.

[31] Second, the high court failed to appreciate the principles applicable in respect of postponements and recusal applications. There was only one application before the magistrate – this was for her recusal - which was properly dismissed. In the present matter, Mr Botha read into the record

his application for the recusal of the magistrate. She warned him of the consequences. He stated in unequivocal terms that he had been instructed by Mr Derris to leave the court room after reading the application into the record. He elected not to participate in the proceedings and left the court of his own volition. There could have been no doubt that he knew of the consequences. It must be emphasised that throughout this saga, Mr Derris remained on record. The unavailability of a legal representative is not necessarily a basis for a postponement of a matter. On the facts of the matter there was no basis for the magistrate to postpone the trial in *vacuo*.

[32] Third, the high court failed to consider Mrs Botha's competing right to have the dispute settled swiftly. It did not take into account the history of the matter. There had already been two prior postponements on similar grounds where Mr Botha's interests were accommodated. It is evident that he had ample opportunity to attain a legal representative and prepare for trial.

[33] Fourth, the criticism of the magistrate is unjustified. There is no doubt that Mr Botha engineered an application for a postponement under the guise of a recusal application. This application was a transparent and dishonest strategy to obtain a postponement. The decision of this court in *Take and Save* referred to in para 26 above is instructive. He fell foul of the principles espoused in that case. It is incomprehensible how it could be said that the magistrate had committed a gross irregularity under these circumstances.

Legal representation

[34] The right to legal representation is a corollary of the right of access to justice. The denial of this right has wide-ranging consequences for the nature and experience of justice. Nevertheless, a litigant may not benefit from his own misconduct or otherwise careless approach to legal proceedings. It is apparent from the record that Mr Botha had ample time to avail himself of a legal representative who was both well-apprised of the dispute and available to attend the court proceedings. Despite this, he failed to secure such. Mr Botha insisted that he would not have any legal representative other than Mr Derris. The high court took the view that he was entitled to an attorney of his own choice. This was an incorrect approach when regard is had to the history of the matter and the rights of the other party. The trial had been postponed three times at his instance. Mrs Botha's rights were completely disregarded by the high court.

[35] Mr Botha's failure in this regard and any prejudice he has suffered must be weighed against that of Mrs Botha as a result of the delay in the resolution of the divorce proceedings between them. The scales inevitably tip in her favour. Accordingly his lack of legal representation cannot be a basis for a finding of any 'grossly irregular' conduct on the part of the magistrate. Her decision to proceed with the divorce trial in his absence or that of his legal representative has to be viewed in the broader context of the matter, which context negates his claim that the prejudice he suffered must now prevail. It follows that the high court should have dismissed this ground of review as well. The failure of the high court to consider the appropriate principles, set out above, resulted in a grave injustice to the magistrate. It may well have prejudiced her professional

life and must have caused her great discomfort and embarrassment. That court's approach is to be deprecated.

Conduct of Mr Derris

[36] The conduct of Mr Derris is relevant to our consideration of this appeal. It deserves censure. He approached the magistrate directly without reference to the other party. Before us, Mr Botha's legal representative conceded that Mr Derris' conduct was improper. I agree. It is inappropriate for a legal representative or party to communicate directly with a judicial officer without reference to and the prior consent of the other party. In this case it was not competent for Mr Derris to seek a postponement of a matter by directing a letter to a magistrate. His behaviour constitutes improper conduct.

[37] Mr Derris' failure to appear in court due to double booking is equally unacceptable. He was aware when he accepted the instructions that he would not be available on 8 March 2012. The fact that a trial date does not suit the legal representative of a party is not a good ground for allowing a postponement. It is so that the Rules of the Law Society of the Cape of Good Hope do not preclude an attorney from having more than one matter on a particular day. This, however, must be read in the context of the case law. It is unacceptable to have an attorney who has accepted two matters set down for trial in different courts on the same day where he or she is appearing. That attorney cannot expect one of the courts to grant him a postponement on the basis that he or she is not available where he had taken the second matter fully aware of his unavailability.

[38] An attorney is subject to a code of ethics and has a duty to the court to conduct himself or herself in a proper manner. He or she has a responsibility to act honestly and openly towards his or her colleagues. In *Brenner's Service Station and Garage (Pty) Ltd* v *Milne & another*,[8] the court held that the proper function of the courts is to try disputes between litigants and that attorneys should not allow themselves to descend to the level of manipulating the court's procedures so that their true purpose is frustrated. In this case, Mr Derris attempted to manipulate the court and force a postponement of the trial due to his unavailability. It was inappropriate for him to instruct Mr Botha to read the application for recusal into the record and thereafter leave the court. His conduct is deplorable and unbecoming of an officer of the court. We have been advised that Mr Derris has been appointed as a magistrate. This judgment shall be sent to the Magistrates' Commission for information.

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8 *Brenner's Service Station and Garage (Pty) Ltd* v *Milne & another* 1983 (4) SA 233 (W) at 240A. [10] See DE van Loggerenberg: *Jones and Buckle*: *Civil Practice of the Magistrates' Courts in South Africa* (2013) at 33-54. See in particular fn 493 and the cases cited therein.

Costs award

[39] As the magistrate has not committed any gross irregularity, the costs order issued against her must be set aside. Nevertheless it is worth emphasising that, in general, the courts will only grant a costs order against a judicial officer in a dispute over the performance of their judicial functions where bad faith on their part has been proven.[10] There are, however, certain instances in which costs orders have been granted against judicial officers where they became party to the proceedings and were unsuccessful. In *Regional Magistrate du Preez* v *Walker*,[9] the judicial officer participated in the proceedings in a manner that warranted additional sanction in the form of the costs order. In such proceedings, the court has an overriding discretion to grant a costs order.

However, such an order will only be granted in unusual circumstances.

[40] On the facts of the present matter, the magistrate's conduct in both adjudicating the divorce proceedings and participating in the review proceedings did not warrant the sanction of a costs order against her. Her reasons for involving herself are clearly stated and objectively justified and reasonable. That, however, cannot be said of Mr Botha and his legal representative, Mr Derris. They devised a plan to compel the magistrate to postpone the divorce proceedings. When that failed, review

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9 *Regional Magistrate du Preez* v *Walker* 1976 (4) SA 849 (A) at 853B. See also *MacLean* v *Haasbroek NO & others* 1957 (1) SA 464 (A).

proceedings were launched. Their conduct is to be deprecated in the strongest possible terms.

[41] In the circumstances, the appeal must be upheld, which will have the effect that the order of the trial court dated 9 March 2012 is reinstated. Regarding costs, the court intends showing its displeasure by ordering Mr Botha to pay the costs of appeal.

[42] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The first respondent is ordered to pay the costs of appeal.

3 The order of the high court is set aside and replaced with:

'The application is dismissed with costs.'

NZ MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: P Eia

	Instructed by:
	Coulters Van Gend & Kotze, Cape Town
	Honey Attorneys, Bloemfontein
For First Respondent:	D Petersen
	Petersen’s Attorneys, Cape Town
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For Second Respondent:	JL McCurdie
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