THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1274/2019

In the matter between:

OAKBAY INVESTMENTS (PTY) LTD	**APPLICANT**
and	
TEGETA EXPLORATION AND RESOURCES (PTY) LTD (IN BUSINESS RESCUE)	**FIRST RESPONDENT**
JOHAN LOUIS KLOPPER NO	**SECOND RESPONDENT**
KURT ROBERT KNOOP NO	**THIRD RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION ("CIPC")	**FOURTH RESPONDENT**

Neutral citation: *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (1274/2019) [2021] ZASCA 59 (21 May 2021)

Coram: PONNAN, WALLIS and SALDULKER JJA and GOOSEN and UNTERHALTER AJJA

Heard: 11 MAY 2021

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Summary: Companies Act 71 of 2008 – business rescue practitioners (BRPs) – removal under s 139(2)(*e*) – scope of section – dispute over inter-company loans – whether giving rise to a conflict of interest warranting removal of BRPs

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J as court of first instance):

The application for leave to appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where two counsel were employed, and the costs of the application to lead further evidence on appeal.

JUDGMENT

Wallis JA (Ponnan and Saldulker JJA and Goosen and Unterhalter AJJA concurring)

[1] In February 2018, eight companies in the Oakbay Group were placed in voluntary business rescue after the four major South African banks decided to terminate their banking facilities, rendering them commercially insolvent.[1] Among the companies were the first respondent, Tegeta Exploration and Resources (Pty) Ltd (Tegeta), and its three wholly-owned subsidiaries, Optimum Coal Mine (Pty) Ltd (OCM), Koornfontein Mines (Pty) Ltd (Koornfontein) and Optimum Coal Terminal (Pty) Ltd (OCT). Oakbay Investments (Pty) Ltd (Oakbay), the applicant and the company that controlled the group, was not placed in business rescue. It was represented in these proceedings, which were commenced on 16 November 2018, by Ms Ragavan, the acting Chief Executive Officer (CEO) of the Oakbay Group. She deposed to the founding and replying affidavits and sought the removal from office of Messrs Knoop and Klopper, the second and third respondents and the appointed business rescue practitioners (the

[1] *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; 2020 (2) SA 93 (SCA).

BRPs) of Tegeta. The application was dismissed by Potterill J in the Gauteng Division of the High Court, Pretoria and she refused leave to appeal. This court referred Oakbay's application for such leave for argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013.

Background to the issues

[2] In addition to their appointment as Tegeta's BRPs, Messrs Knoop and Klopper were appointed, together with two others, as the BRPs of OCM and jointly as the BRPs of Koornfontein. Mr Knoop was appointed as the sole BRP of OCT. These appointments were said by Oakbay to give rise to a conflict of interest between their duties in relation to Tegeta and their duties, principally in relation to OCM, but generally to all three subsidiaries. It based its case for their removal on s 139(2)(*e*) of the Companies Act 71 of 2008 (the Act). First, however, it is necessary to outline the facts said to give rise to the conflict of interest.

[3] According to Oakbay, when Tegeta purchased the shares in OCM, Koornfontein and OCT, a balance sheet annexed to the sale agreement reflected that all three subsidiaries were substantially indebted to their then holding company in respect of inter-company loans.[2] As a result of the sale, Tegeta was said to have stepped into the shoes of the previous holding company as the party to whom those loans were owed. Thereafter further transactions occurred between the four companies. According to Ms Ragavan the outcome of these was accurately reflected in the audited annual financial statements for the three subsidiary companies that she annexed to the founding affidavit. These showed that all three companies had substantially reduced their liability to Tegeta and, in

[2] In round figures the amounts given in the affidavit were R4,3 billion in the case of OCM; R360 million in the case of Koornfontein; and R225 million in the case of OCT.

the case of Koornfontein, Tegeta had borrowed considerable sums from it by way of inter-company loans.[3]

[4] Ms Ragavan did not deal in any detail with the transactions that originally gave rise to the inter-company loans or those that occurred in the two years and two months that elapsed between Tegeta's acquisition of OCM, Koornfontein and OCT and the four companies entering business rescue. There was thus no explanation for the changes in the amount of these loans. She explained that the companies operated as related entities, with often common shareholders and asserted that the claims based on the inter-company loans were unassailable. She added:

'… there was never any contemplation by [Oakbay] that any party could question the inter-company loans as has now been done by the BRPs.'

[5] This latter statement ignored the fact that the auditors of all four companies had questioned the correctness of the accounts in relation to the inter-company loans. All of the audited annual financial statements on which Ms Ragavan relied, as well as those of Tegeta, contained a disclaimer by the auditors based on a lack of properly maintained accounting records. Whilst the disclaimers were general and extensive, in three instances[4] the auditors said that they were unable to satisfy themselves of the 'Completeness, Valuation and Validity of Related Party Transactions and Balances' and in the other that they could not satisfy themselves of 'All assertions relating to Loans from Group Companies'.[5] In reporting on whether the companies were going concerns, they said that there was material uncertainty about their going concern status. Tegeta had incurred a financial loss

[3] The amounts in round figures were now said to be R2,6 billion for OCM; R291 million owing to Koornfontein; and R45.5 million for OCT.
[4] Tegeta, OCM and Koornfontein.
[5] OCT.

of over R80 million for the 2017 financial year. In relation to OCM and Koornfontein they said:

'We conclude that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive.'

[6] Hence, even before the BRPs took office, question marks had been raised in relation to the inter-company loans. The BRPs had to investigate these loans as part of their obligation in terms of s 141(1) of the Act to determine whether there was any reasonable prospect of the businesses being rescued. When they sought access to the offices and records of the companies under business rescue, such access was denied at the instance of Ms Ragavan. Urgent proceedings had to be brought to secure access and these were finalised on 2 May 2018. Thereafter the BRPs commissioned a report from Mr Harcourt-Cooke on the flow of funds into and out of Tegeta's bank account and the inter-company loans.

[7] Rather than resolving the BRPs' concerns in relation to the inter-company loans, Mr Harcourt-Cooke's report exacerbated them. It reflected transfers from OCM to Tegeta in excess of R1 billion between May 2016 and January 2018 and transfers from Koornfontein to Tegeta of more than R2.7 billion between April 2016 and February 2018. Ms Ragavan informed Mr Harcourt-Cooke that Tegeta performed a group treasury function. Whilst this is not unusual, there was no suggestion that it was being conducted in terms of a sweeping arrangement with the Oakbay group's bankers.[6] The BRPs said, without rebuttal, that the funds were being moved at Ms Ragavan's discretion. That is not a conventional way in which to perform a group treasury function, nor was Ms Ragavan's justification that these cash flows were to 'pay salaries', convincing. That would require very careful and accurate records to be maintained to show the propriety of the

[6] *MV Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation)* [2019] ZASCA 67; [2019] 3 All SA 321 (SCA) paras 38 and 50-58.

movement of funds and the levels of inter-company indebtedness at any particular time. The auditor's qualifications to the accounts showed that this was not being done.

[8] Mr Harcourt-Cooke's conclusion to his third and final report dated 20 June 2018 made it clear that the figures in respect of inter-company loans were, at the lowest, highly debatable and the legitimacy of the inter-company transfers was open to question. The summary of his findings read:

'We have been unable to verify the validity and accuracy of the inter-company balances at 20 February 2018 being the date OCM and 7 other companies were placed in Business Rescue for the following reasons:

- In certain instances, the opening inter-company balances at 28 February 2017 do not agree.
- A number of the loan account balances have substantial opening balances carried forward from prior years.
- We are unable to place reliance on the opening balances at 28 February 2017 as a number of the audit reports in the Audited Annual Financial Statements "AFS" express a "disclaimer" of audit opinion at that date.
- Jan Tolmay has not finalised the OCM books to 28 February 2018. He currently has no access to the SAP accounting system and is unable to retrieve the detailed debtors and creditors sub-ledgers at 28 February 2018.
- Not all supporting documents are available and have not been provided to support payments made.
- There are no documents available/provided to support journal entries passed.
- Where payments were made by third parties to other companies in business rescue these transactions have not been recorded in the respective entities books.
- We have noted in certain instances payment descriptions on the bank statements as "Tegeta" where in fact the funds were paid [to] "Oakbay Investments".
- We have not been provided with all the loan agreements to support transactions between OCM and the other companies in business rescue, and certain loan agreements provided the agreements to not stand up to scrutiny and do not appear to be on an arm's length basis.

- We have not been provided with all management agreements between Oakbay and OCM and other companies in business rescue, and those provided do not stand up to scrutiny and do not appear to be on an arm's length basis eg Oakbay charging Koornfontein R1 m per month, and TNA Media (Pty) Ltd agreement with Koornfontein signed on 2 May 2017 for a sponsorship agreement of R 24 m.'

[9] Apart from the investigation by Mr Harcourt-Cooke, the BRPs obtained copies of Tegeta's bank statements with the Bank of Baroda for the period from 1August 2016 to 28 February 2018. These showed a pattern of funds flowing in and out with bewildering frequency and for no apparent reason. The following are examples. On 25 January, a few weeks before the companies were placed in business rescue, OCM deposited R13 million in Tegeta's account, the bulk of which was used to pay Eskom. OCM deposited a further R5.5 million on the same day and this was immediately paid to a related company, Shiva Uranium (Shiva), in which the majority shareholding was held by Oakbay. On 25 January OCM deposited a further R13 million and this was immediately paid to Koornfontein. On 26 January OCM deposited R1 million and R1.5 million was paid to Koornfontein. On 29 January OCM deposited R500 000 and this was paid to Shiva. On 31 January Koornfontein deposited R50 million, of which R35 million was paid to OCM and R2 million to Shiva. On 1 February two payments of R4 million and R3.5 million were made to Koornfontein and a further R5 million to Shiva. The following day OCM paid R5 million to Tegeta and this was immediately paid to Koornfontein. On 5 February OCM paid a further R6.5 million to Tegeta, which transferred it the same day to Koornfontein.

[10] The bank statements showed the same pattern of payments in and out of the Tegeta account for the entire period they covered. In dealing with a similar pattern of payments in the bank accounts of one of the other companies in business rescue, I remarked that the image of a washing machine or spin dryer

sprang to mind.[7] The image is equally apposite here and it was a legitimate matter of concern to the BRPs. The statement by Mr Knoop, in his answering affidavit, that 'the Oakbay companies were run with little or no regard to the separate corporate identities of the individual companies making up the group' went unanswered. In those circumstances the BRPs cannot be faulted for viewing the figures in relation to inter-company loans with circumspection, if not outright suspicion.

[11] On 25 April 2018, before these investigations had been undertaken, the BRPs proposed a business rescue plan in respect of Tegeta. The basis for the plan was the disposal of the business as a going concern. It reflected an indebtedness by Tegeta to Koornfontein of nearly R306 million and lesser amounts owing to other group companies, but provided for no dividend to be paid to them whether Tegeta was under business rescue or placed in liquidation. An indebtedness of OCM to Tegeta in an amount exceeding R2.6 billion was said to be disputed and it was not reflected as an asset of Tegeta.

[12] Two days earlier the BRPs of OCM had also published a business rescue plan. It proposed what was described as a 'Trade Out with a view to Sell'. This meant that the company would continue to operate in terms of an operating agreement concluded with a third party and concurrently a sales process would be held to sell the assets and business operations of the mine using a wind down process. The full plan reflecting all creditors was not before the court, but an annexure to the plan showed the Tegeta claim of some R2.6 billion as a disputed claim.

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[7] *Knoop NO and Another v Gupta (Tayob as intervening party)* [2020] ZASCA 163; 2021 (3) SA 88 (SCA); [2021] 1 All SA 726 (SCA) para 137.

[13] The BRPs said that the treatment of the Tegeta claim against OCM was irrelevant, because on any basis there would be no free residue available to pay a dividend to Tegeta after paying all other OCM creditors. In dealing with the OCM plan Mr Knoop said that the loan by Tegeta was irrecoverable and that its voting interest would be nil, because in a liquidation scenario there was no prospect of its receiving a dividend. This was in accordance with the provisions of s 145(4)(*b*) of the Act. Given the qualifications to the annual financial statements of OCM it is not possible to accept that it was solvent at the time when business rescue commenced.

[14] The BRPs drew attention to a subordination agreement entered into between Tegeta and OCM and witnessed on behalf of both companies by Ms Ragavan, but not mentioned in the founding affidavit. This agreement was concluded at the time Tegeta acquired the shares in OCM, Koornfontein and OCT, and provided that Tegeta subordinated so much of its claim against OCM for the benefit of the other creditors of OCM, both present and future, as would enable such claims to be paid in full as and when such claims fell due. The claims of such creditors were to rank preferentially to the claim of Tegeta and Tegeta undertook in any liquidation or business rescue of OCM not to prove or tender a claim, proof of which would reduce or diminish any liquidation dividend payable to other creditors. An examination of the OCM business rescue plan revealed that neither employees nor concurrent creditors were to receive a dividend of one hundred cents in the Rand. Accordingly, as matters were perceived to be at that early stage, without access to the records and accounts of either Tegeta or OCM, the provisions of the subordination agreement applied and Tegeta was precluded from proving a claim in respect of its loan to OCM, whatever the amount thereof.

[15] In reply, Ms Ragavan did not attempt to justify the amount of Tegeta's claim, nor did she refute the BRPs statements or attempt to do so. Against that

background I turn to deal with her grounds for seeking the removal of the BRPs and the issues to which they gave rise.

Discussion of the issues

[16] The application was based squarely and solely on the provisions of s 139(2)(*e*) of the Act, which empowers the court upon the request of an affected person, or on its own motion, to remove a BRP from office on the grounds of 'conflict of interest or lack of independence'. The primary contention was that the appointment of the same BRPs in respect of companies in a single group was inappropriate as it had led to conflicts of interest due to the existence of inter-company loans and claims. This contention was advanced as a matter of general principle. The secondary case, if the general contention was rejected, was that the facts set out above in regard to the BRPs treatment of the Tegeta claim against OCM demonstrated that they were conflicted because they were acting on behalf of Tegeta, in which capacity they were obliged to pursue the claim with vigour, while on behalf of OCM they were required, with equal vigour, to resist the claim. The conflict was said to be both obvious and irresoluble.

[17] The primary contention was not pursued in argument because this court had already rejected it in a judgment delivered last November in a case involving an attempt to remove the same two BRPs from office in two of the other companies in the Oakbay Group.[8] To the exposition of the principles underlying s 139(2)(*e*) in that judgment,[9] I would add only that I am by no means satisfied that the complaint being advanced is one falling within that section.

[18] An examination of the sub-sections of s 139(2) reveals that each appears to be concerned with a personal quality or action of the BRP whose removal is

[8] *Knoop NO and Another v Gupta (Tayob as intervening party)* ibid, paras 140 and 141.
[9] Ibid, para 23.

sought, namely, incompetence; failure to perform their duties; failing to exercise due care in the performance of their duties; engaging in illegal acts or conduct; no longer satisfying the requirements of s 138(1) for their appointment; conflict of interest or lack of independence; or incapacity or inability to perform their functions. The ordinary understanding of a conflict of interest as explained in the previous judgment is a situation where the private interests of the BRP conflict with their obligations to the company in respect of which they have been appointed. That is not the complaint in the present case, where the conflict is alleged to arise as between the interests of Tegeta and OCM, not between the BRPs and either company. Whether that also comes within section 139(2)(*e*) is perhaps debatable.[10]

[19] This is not to say that where such an inter-company conflict arises it may not necessitate the BRP resigning, or being removed from office, in respect of one or other company, or possibly both of them. But the reason for that would be that the conflict prevented them from performing, or resulted in their failing to perform, their duties.[11] Alternatively it might render it impossible to exercise the proper degree of care owed to each company in the performance of their duties.[12] The invocation of either of those provisions would involve a consideration of different issues and potentially would mean that the BRP should be removed from office in respect of both companies, and not the somewhat peculiar approach, adopted by Oakbay in this case, that they are unfit to continue as BRPs of Tegeta, but remain fit to continue in office as BRPs of OCM and the other companies. However, having made those comments, it is unnecessary to express any final conclusion in that regard, as it was not argued, save in response to some questions

[10] C/f *American Natural Soda Ash Corp and Another v Botswana Ash (Pty) Ltd and others* [2007] ZACAC 1, a case of side shifting and *Prince Jefri Bolkiah v KPMG (a firm)* [1998] UKHL 52; [1999] 1 All ER 517 (HL).
[11] In the case of a clear conflict, they might be unable to move forward with the business rescue in respect of either company.
[12] A decision that favoured the one over the other could give rise to a contention that they had not exercised due care in relation to the disadvantaged party.

from the bench, and the case can be resolved on the assumption that Oakbay's contentions can be advanced under s 138(2)(*e*).

[20] I turn to the secondary ground advanced on behalf of Oakbay. Its complaint about the treatment of the Tegeta claim against OCM was set out in the following paragraphs of Ms Ragavan's founding affidavit:

"'2.30 What is apparent … is that the BRPs will effectively be forced to act as mediators between Tegeta and Optimum Coal Mine whilst representing both the entities simultaneously.

2.31 At present it seems they are intent on compromising Tegeta's claim in Optimum Coal Mine for the sole purpose of extinguishing all creditors' claims in Tegeta, to the extreme detriment of the shareholders and other creditors.

2.32 Put differently, the BRPs are trying to represent the interest of Optimum Coal Mine (as a debtor of Tegeta) and those of Tegeta (as a creditor of Optimum Coal Mine) at the same time.

2.33 Irrespective as to their intentions, the BRPs cannot simultaneously act for both parties in the face of a dispute between the parties, the resolution of which can only be beneficial to the one and detrimental to the other.

2.34 I respectfully submit that from the above there can no longer only be a fear of a conflict of interest manifesting itself, but that it is unequivocally so that a conflict has arisen.'

[21] The conflict posited by Oakbay simply did not exist when the two business rescue plans were prepared and published. Both adopted precisely the same approach to the indebtedness of OCM to Tegeta, namely that it was not clear and there might be grounds upon which to challenge either its existence or its amount. Accordingly, both treated it as disputed. But that did not mean that the BRPs were constrained to adopt the hostile adversarial approach that these paragraphs were based on. Once the BRPs obtained access to the accounts of the two companies they would have the opportunity, with outside professional assistance, to reconcile them to see whether the Tegeta claim was valid and, if so, in what amount. There was no need at the time the business rescue plans were prepared and published for litigation, or some other form of dispute resolution, to resolve

the issue. As matters stood it seemed likely to be an academic exercise given the financial circumstances of the two companies.

[22] Counsel's submission in response to a question from the presiding judge as to the basis of his case was that there was a conflict of interest because in the business rescue plan for Tegeta the BRPs did not recognise the OCM debt, whilst in the plan for OCM they did recognise it. When it was pointed out that both plans dealt with the debt on precisely the same basis, by treating it as disputed, the argument shifted to the non-recognition of the debt. Rhetorically, counsel asked how that was explicable unless there was a conflict. The short answer is that the debt's existence and amount was uncertain and it was accordingly dealt with as disputed.

[23] The misconception underlying the entire argument emerged from a submission that the heart of the difficulty lay in the fact that, when the BRPs were wearing their Tegeta hats, they had a duty to pursue the Tegeta claim on behalf of Tegeta. But this was to confuse business rescue with insolvency, where an obligation rests on the trustee or liquidator to collect the assets of the insolvent or company in liquidation, reduce them to monetary amounts and distribute them among the creditors. No such obligation rests upon a BRP. Their obligation is to investigate in order to ascertain whether there is a reasonable prospect of the company being rescued. It is established that this means more than that the company will be returned to solvent trading. It includes a situation where the company is wound down on terms that provide a better return for creditors or shareholders than on an immediate liquidation.[13] The responsibility of the BRP is to investigate and ascertain whether either of these is reasonably possible.

[13] See s 128(*b*)(iii) of the Act.

[24] When dealing with a complex group of companies, all ultimately controlled by the same people, there is little point in the BRPs becoming embroiled in arguments within the group concerning inter-company indebtedness, unless a stage is reached when a question relating to such indebtedness must be resolved in order to address conflicting interests of third party creditors. That is the kind of situation that arose in the case to which we were referred arising from the liquidation of the Macmed group of companies.[14] There the liquidators, for reasons of their own, recognised a claim by the holding company of the Macmed group, the effect of which was materially to prejudice the position of two banks that had lent substantial sums to a subsidiary company and who would otherwise have made a substantial recovery on their claims. There was accordingly a fundamental conflict between the claim being advanced by liquidators on behalf of the holding company and the interests and claims of the two banks.[15] That was compounded by the fact that the two liquidators of the subsidiary were also liquidators of the holding company and had concluded a fee-sharing agreement with their co-liquidators in the holding company. The fee share would be affected depending on the outcome of the disputes with the two banks over their claims and the claim by the holding company. The present situation was entirely different.

[25] We received some submissions that the BRPs were in default of their obligations in terms of s 145(5)(*b*) of the Act to appoint a suitably qualified person to appraise Tegeta's claim and value its voting interest on the basis that it was a subordinated concurrent claim. The apparent purpose of this provision, when applied in a situation such as the present, is to remove any risk of a conflict arising over the existence and value of such a claim. If anything, the existence of

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[14] *Standard Bank of SA Limited v The Master of the High Court (Eastern Cape Division)* [2010] ZASCA 4; 2010 (4) SA 405 (SCA); [2010] 3 All SA 135 (SCA)

[15] The liquidators had refused to recognise either bank's claim and had engaged in protracted and unsuccessful litigation in resisting them.

this independent mechanism reduces the possibility of the BRPs being conflicted as claimed. Accepting that this exercise would need to be done before any meeting could be held at which creditors would have the right to vote, there is no suggestion that this stage had been reached. All attempts to convene a meeting were faced with threats of litigation and, by the time this application was launched, the BRPs were both better informed and in the course of preparing fresh business rescue plans. Had a case of conflict of interest been made out those facts would have been relevant to the exercise of the court's discretion to remove the BRPs. It suffices for present purposes to say that the case on a conflict of interest was not advanced by reference to s 145(5)(*b*).

Conclusion

[26] I am accordingly satisfied that Oakbay's complaints was not established. Nothing more than the possibility of conflict in some unlikely circumstances in the future emerged from these papers. In those circumstances there is no reasonable possibility of an appeal succeeding and the application for leave to appeal must be dismissed. That must carry with it an order for payment of the costs, including the costs of two counsel where two counsel were employed.

[27] One final matter arose from Oakbay lodging an application to lead further evidence on appeal on 3 May 2021. Counsel sought to deal with this application at the outset of the argument, but desisted after it was pointed out that the application was academic at the stage of considering the application for leave to appeal. Until leave was granted there could be no question of leading further evidence on appeal. In order to obtain leave he had to show that a case of conflict of interest justifying the removal of the BRPs appeared from the existing papers. Accordingly, the application seemed to have little purpose. If that case was established, there was no need for further evidence to establish it. If it was not, it was too late to rescue the original case and the evidence in the application to lead

further evidence on appeal would only be relevant if a fresh application for the removal of the BRPs were made. In the circumstances the application was not pursued. On any basis Oakbay must pay the costs of that application.

[28] In the result the following order is made:

'The application for leave to appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where two counsel were employed, and the costs of the application to lead further evidence on appeal.'

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	MR Hellens SC (with him L van Gass)
Instructed by:	Van der Merwe & Van der Merwe, George; Honey Attorneys, Bloemfontein
For respondent:	G D Wickens SC (heads of argument prepared by P Stais SC and G D Wickens SC)
Instructed by:	Smit Sewgoolam Attorneys, Johannesburg McIntyre Van der Post, Bloemfontein.