REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE 1) REPORTABLE : YES/NO 2) OF INTEREST TO OTHER JUDGES: YES/NO 3) REVISED **DATE**___________ ____________________ **SIGNATURE**

CASE NO: 2011/31374

In the matter between:

ANTHONY LOUIS MOSTERT N.O. Applicant

and

JUNE MARKS INCORPORATED First Respondent

JUNE STACEY MARKS Second Respondent

CASE NO: 2011/31377

In the matter between:

ANTHONY LOUIS MOSTERT N.O. Applicant

and

JUNE MARKS INCORPORATED	First Respondent
JUNE STACEY MARKS	Second Respondent

CASE NO: 2011/31378

In the matter between:

ANTHONY LOUIS MOSTERT N.O.	Applicant
and	
JUNE MARKS INCORPORATED	First Respondent
JUNE STACEY MARKS	Second Respondent

CASE NO: 2011/31386

In the matter between:

ANTHONY LOUIS MOSTERT N.O.	Applicant
and	
JUNE MARKS INCORPORATED	First Respondent
JUNE STACEY MARKS	Second Respondent

CASE NO: 2011/31387

In the matter between:

ANTHONY LOUIS MOSTERT N.O.	Applicant
and	
JUNE MARKS INCORPORATED	First Respondent
JUNE STACEY MARKS	Second Respondent

_

JUDGMENT

MAYAT J

INTRODUCTION

[1] This matter relates to five separate applications between the same parties in relation to similar claims. All five matters were argued simultaneously before me, with the same counsel appearing for the applicant in each case, and the same counsel appearing for the first and second respondents in each case.

[2] For the reasons already given, applications for a postponement of all the matters, at the instance of the respondents, were dismissed by me.

PARTIES

[3] The applicant, Anthony Mostert N.O. ("Mostert"), an attorney, instituted the present proceedings in his capacity as the provisional curator of a pension fund named the Cadac Pension Fund ("the fund") pursuant to a court order granted on the 22nd of December 2010.

[4] The first respondent in each case is June Marks Inc, a firm of attorneys duly registered in terms of the company laws of the Republic of South Africa as well as the Attorneys Act, 53 of 1979, as amended.

[5] The second respondent in each case is June Stacey Marks ("Marks"), an attorney practising for her own account under the name and style of the first respondent.

RELIEF CLAIMED

[6] The applicant seeks judgments against the respondents for monetary payments in various amounts. The monetary relief claimed is premised upon various payments already made by the fund to the respondents over a period

of time in respect of invoices for legal costs from the respondents, apparently for disbursements for advocates' fees. The applicant contends in the founding papers in this regard that to the extent that the said invoices did not relate to any legal matters involving the fund, the applicant was not liable on a *prima facie* basis to the respondents for the payment of such invoices.

[7] As Marks practised at all relevant times for her own account, under the name and style of the first respondent, the applicant seeks monetary relief against both respondents, jointly and severally, the one paying the other to be absolved.

PERTINENT BACKGROUND

[8] The applicants instituted the present applications in August 2011. As already indicated, the notices of motion in all the matters are substantially similar to the extent that the primary relief sought by the applicant in each case constitutes monetary payment by the respondents. Specifically, the applicant seeks payment of the sum of R615 860-48 in case number 2011/31374; the sum of R223 400-00 in case number 2011/31377; the sum of R114 000-00 in case number 2011/31378; the sum of R831 747-00 in case number 2011/31386; and the sum of R603 744-00 in case number 2011/31387. Counsel for the applicant confirmed that the amounts claimed in each case were premised upon payments from the fund to the respondents which were traced by Brand and Mostert.

[9] The deponent to the applicant's founding affidavit, Alphonso Brand, a chartered account, states by way of background that after the appointment of Mostert as the provisional curator of the fund in December 2010, the financial affairs of the fund were investigated. It was subsequently ascertained by Mostert that Marks had been appointed as attorney for the fund at least since 2005, apparently on the initiative and instruction of a certain Simon Nash, who purported to act as a trustee for the fund at the time. For the purposes of the present applications, the composition and authority of the board of trustees of the fund is not relevant, and the applicant places reliance on Marks' contention that she acted as an attorney for the fund.

[10] Brand further states that during the course and scope of Mostert's duties as provisional curator of the fund, certain documents relating to the financial affairs of the fund were obtained. Mostert also completed a report for the Financial Services Board ("the FSB"). To the extent that it is relevant in this context, Brand indicates that Marks initially failed to provide Mostert with all invoices relating to payments made by the fund to the respondents. Marks also apparently informed Mostert, at very short notice that she would not be complying with subpoenas issued by Mostert for Marks to testify at an enquiry relating to the financial affairs of the fund. Be that as it may, Mostert eventually obtained from Marks certain invoices from various advocates to the first respondent as well as invoices from the first respondent to the fund, which apparently gave rise to certain payments by the fund to the respondents over a period of time. It appeared from the said invoices that specified payments were sought by the respondents from the fund in respect of legal costs, apparently for disbursements for advocates' fees in various matters, and the fund made such payments.

[11] For the purposes of the present applications, Brand supplemented the aforestated invoices, with certain documents attached to the FSB report, insofar as these documents related to the subject matter of the present applications. In addition, relevant bank statements and cash book records of the fund were obtained from the administrators of the fund. It appears from such documentation that the fund had paid various amounts of money to the respondents, ostensibly on the basis of such invoices. The said invoices as well as relevant bank statements and cash book records of the fund, confirming payments by the fund to the first respondent, all form part of the founding papers.

[12] As regards the copies of the invoices annexed to the founding papers, it appears that certain information reflected on some of these invoices was blacked out on a computer (and not manually) before they were provided to Mostert. It also appears that additional information was added in manuscript notes on some of these invoices, apparently by Marks. Thus, it appears that

details relating to the services rendered by certain advocates and/or details relating to the amount charged by certain advocates were blacked out, and substituted with handwritten details on some of the invoices provided to Mostert.

[13] To the extent that it is relevant in this context, Brand states at a general level that the bank statements of the fund reveal that the respondents were paid in excess of R10 million by the fund over a period of time. The present claims by the applicants accordingly constitute a small proportion of the total monies received by the respondents from the fund over a period of time. Thus, it was suggested by the applicant's counsel in argument that the present applications only represent the "tip of the iceberg". Be that as it may, in the context of the present applications, Brand states in each case on the basis of specified invoices from the respondents, and in some instances from counsel to the respondents, that money was demanded from time to time by the respondents from the fund for legal costs in the form of "disbursements", and pursuant to such demands, various amounts of money were paid by the fund to the respondents from time to time.

[14] Brand further states that all payments effected by the fund on the basis of invoices referred to in the founding papers do not appear to relate to legal matters involving the fund. It also appeared that in most instances where the respondents provided invoices from advocates, such details, both in terms of amounts and services, did not accord with concurrent descriptions reflected on correlating invoices from the first respondent to the fund. In these circumstances, it is averred by Brand in the founding papers, that the fund was not liable, on a *prima facie* basis, to the respondents for payment of legal costs, including "*disbursements*" for counsels' fees for matters unrelated to the fund. He also states in this regard that he was advised by Mostert that any arrangement or agreement in terms of which the fund was to pay such disbursements would, in any event, have been *ultra vires* the rules of the fund. Simply put, Brand avers in the founding papers that the fund could not accept liability for legal costs and disbursements relating to other entities or individuals such as Nash, particularly *ex parte* or criminal proceedings relating

to such entities or individuals.

[15] Against this background, as already indicated, the primary relief sought by the applicant, as encapsulated in prayer 1 of the notices of motion, constitutes repayment by the respondents of monies paid by the fund to the respondents for alleged legal costs, including disbursements to counsel, which did not relate to the fund.

[16] It is also pertinent by way of background that in terms of prayer 2 of the notice of motion in each case, the applicant further claimed in the alternative, the following relief:

> "*in the event of the respondents disputing their liability in respect of the* [monetary] *relief sought… the respondents are directed to render to the applicant a detailed statement of account in respect of all disbursements for which* [the fund] *was legally liable to pay the respondents for and in respect of* [specified advocate/s for specified period/s] *with full written reasons for such alleged liability within (10) ten days from date of order*."

[17] The notices of motion in each case further incorporated relief to the effect that the applicant be granted leave to supplement its founding papers in each case within 10 days, in the event that the abovestated, alternative relief set out in prayer 2 of the notices of motion is granted.

[18] Thus, as already indicated, the facts and averments in each of the present applications are very similar. It is also averred in all the applications that the fund is not liable on a *prima facie basis* for a number of invoices from the respondents with citations by counsel such as "*SIMON NASH REGARDING FSB INQUIRY"; "EX.P SIMON NASH AND FSB"; "STATE V SIMON NASH AND ANOTHER";* and "*S V NASH"*. Similarly, it is averred that the fund is not liable on a *prima facie* basis for civil and criminal proceedings involving Nash; invoices relating to FSB and another v Lifecare Group; the Powerpack Pension Fund (in liquidation) and Cullinan Holdings Limited; the so-called "*first section 14 application*"; and the so-called "*second section 14 application*"; Lifestyle Holdings; various unspecified matters*;* general matters involving a section 417 enquiry, apparently relating to a liquidation; and a

case between the FSB and the Healthcare Group.

[19] Whilst a notice of intention to oppose was filed by the respondents in each case, no answering affidavit was filed in any of the cases within the time limits prescribed by the Uniform Rules of Court. It may also be mentioned in this context that the respondents initially filed a 30 page notice in terms of rules 35(12) and (14) seeking a very long list of documents for inspection, including inter alia Mostert's report to the FSB, email communications relating to the fund, the financial statements of the fund and disclosures to the FSB. The said notice also incorporated lengthy averments pertaining to documents sought by the respondents from the applicant for the purposes of accounting by the respondents to the applicant. The respondents further disputed Brand's authority to depose to the founding affidavits in the present applications on the basis that he had not filed a copy of his authorization with the founding papers. It appears that after the applicant's attorneys advised the respondents that the said notice constituted an abuse of the court process, this aspect was not pursued by the respondents. Thereafter, all the applications were set down for hearing by the applicant on the 11th of October 2011, and subsequently came before Mathopo J on the 12th of October 2011.

[20] In terms of a subsequent order granted by Mathopo J in each case on the 12th of October 2011, both the respondents were ordered inter alia to provide the applicant with:

> "*…a detailed statement of account to the Applicant within twenty (20) days after the Applicant provided such documents as identified by Respondents, and agreed to by the Applicant before 11h30 on the 14th October 2011, which statement of account will be in a manner stipulated in prayer 2 of the Notice of Motion in each case number*"

The said order to provide a detailed statement of account, incorporating prayer 2 of the notice of motion in each case, referred to above, is hereinafter referred to individually and collectively in the context of each case as "the court order".

[21] Pursuant to the court order, the respondents served and filed a statement of account on the 15th of November 2011 in tabular form, comprising eight

columns. The applicant's attorneys advised the respondents' attorneys at the time that the said statement of account was not adequate in terms of the applicable law. Specifically, the respondents were called upon to provide detailed reasons for the applicant's liability for disbursements referred to in the founding papers, in each application individually. The applicant also objected at the time to the statement of account filed on the basis that the respondents did not furnish a written statement under oath nor did the respondents incorporate supporting vouchers to their statement of account.

[22] In their communications to the respondent's attorneys at the time, the applicant's attorneys also referred the respondents' attorneys to the unreported judgment of Binns-Ward J in the Western Cape High Court, in the case of *Grancy Property Ltd and Montague Goldsmith AG, v Seena Marena Investments (Pty) Ltd and Others*, case number 15757/2007. Similar to the applicant in the present case, the applicants in that case contended that a statement of account rendered to the applicants pursuant to a previous court order was "inadequate" and did not constitute compliance with the said order. Binns-Ward J restated, at a general level, the dicta from previous authorities to the effect that the nature and adequacy of an account to be rendered necessarily depends on the nature of the relationship giving rise to a duty to account.[1] He also stated that:

> *"it behoves an accounting party to indicate precisely to which purposes various payments were allocated"*[2]

The learned Judge further made reference in the context of adequate accounting to:

> *"supporting vouchers where such exist, to inform the applicants of what happened to their funds and for what purpose they were applied at every level of the transaction*".[3]

[23] In these circumstances, the applicant's attorneys conveyed to the respondents' attorneys that the statement of account rendered by the respondent were not adequate and did not comply with the court order, which

1 Paragraph 12
2 Paragraph 30
3 Paragraph 34

expressly referred to a "*detailed statement of account"*. By way of response, the respondents served and filed separate statements of account in each matter on the 22nd of November 2011, also in tabular form comprising eight columns, without conceding that the statement previously delivered on the 15th of November 2011 was inadequate. The second set of statements, which were marginally different to the statement initially filed, were accompanied in each case by a short affidavit by Marks, who stated that she was also duly authorised to depose to the said affidavit on behalf of the first respondent. Marks further confirmed in the said affidavit that she had prepared a detailed statement of account pursuant to the court order in each matter. In addition, she confirmed that "*full written reasons of the liability appear from the narration of the counsel's account referred to in the detailed statement of account*". It also appears that a letter was sent from the respondents' attorneys to the applicant's attorneys at the time in which it was stated that despite the fact that the applicant was in possession of all relevant invoices in these matters, for the purposes of adjudication, "*all available invoices*" which were referred to in the second set of statements filed by the respondents, would also be delivered by the respondents to the applicant.

[24] By way of background to the submissions put forward by the applicant's counsel relating to the statements of account, which are canvassed hereunder, it is necessary for me to describe the nature and contents of these statements. Whilst my description in this regard is by no means comprehensive, I shall endeavour to point out certain features of these statements which I consider to be representative of the said statements and/or distinctive and/or significant in the context of the applicant's claims.

[25] At a general level, Marks states in her short affidavit that the information incorporated in the statements of account prepared by her included information described by her in terms of eight topics. The stated topics are reflected as headings to eight columns on the front pages of each set of accounts. The stated topics and headings relate to invoice numbers; the dates of the advocate's attendance; the narration on the advocates account; '*the Narration on the Respondents Account for Advocate and already authorised'*;

the amount charged by the advocate; the amount paid by the fund; the amount paid by Nash (where applicable); and the date of payment to advocates as well as the amount paid. It may be mentioned that it appears that much of the information furnished by Marks under these headings was already in the applicant's possession, as evidenced by the founding papers.

[26] In these circumstances, Marks provided inter alia certain information in a column which is entitled '*Narration of counsel's Account'* as well as certain information in a rather enigmatically entitled column '*Narration on Respondents Account for Advocate and already authorised'*. In many instances, the correlating narrative by Marks in both columns on its own (without reference to invoices) did not stipulate the client concerned and the specific matter concerned. For example, whilst there is frequently a narrative relating to the perusal of documents, or discussions, or consultations, or reading letters, or reading arch lever files, in one or both columns, there is no mention of the fund (as the client) nor is there any mention of any specific matter relating to the fund. To take further examples, narratives relating to unspecified enquiries from the FSB as well as unspecified letters to the FSB make no reference in both correlating columns to either the fund (as the client), or the nature of the stated enquiries and letters. Moreover, the specific matter being dealt with by the respondents and/or counsel on behalf of the fund is not stated. Sometimes, the narrative in the column relating to counsel's account merely records an attendance such as "*1 Hr advise"*, with no correlating narrative in the column relating to the respondents' account. In these circumstances, when regard is had to the invoices on record it appears that narrations inserted by Marks do not appear to relate to matters which involved the fund.

[27] For some reason, in numerous instances, the narrative in the column relating to counsel's account was very cryptic, and the correlating narrative in the column relating to the respondents' account was much more detailed. In other instances, there is only a narrative in the column relating to the respondents' account and no correlating narrative in the column for counsel, suggesting that there was no disbursement for counsel. In two such

instances, for example, it is recorded that the fund paid the amounts of R39 648-00 and R65 472-00, and as there is no correlating counsel's account or fee, it appears that such amounts and similar amounts were all appropriated by the respondents. However, there is no clear indication how such money was allocated or appropriated in each instance by the respondents, partly by virtue of the fact that the statements of account prepared by Marks do not reflect a running balance (either as a debit or a credit to the fund) pursuant to each transaction.

[28] At other times, the information provided by Marks in both the stated narrative columns is somewhat cryptic. Thus, details under these columns include descriptions such as '*preparation', 'on preparation of note to attorney', 'consultation', 'enquiry', 'on appearance'; 'opinion work'*, '*on perusal of draft statement',* '*on the Constitutional attack',* '*consideration of statement', 'discussions with counsel', 'to research', 'to conversations'* and so forth, and nothing is stipulated about the fund as client, and/or any specific matter relating the fund. At other times, the narrative column relating to the respondents' account merely stipulates a date, with no other details.

[29] As already indicated, it appears that all of the invoices annexed to the founding papers taken together with the narrative by Marks suggest that legal services were rendered by the respondents for matters unrelated to the fund, and monies were then paid by the fund to the respondents for these services. Thus, for example, one specific narrative in the column relating to counsel's account indicates that the fund was charged counsel's fees in January 2008 for counsel considering a "*liquidator's claim (charged to Nash)".* It also appears, though it is not entirely clear, from the narrative relating to the respondents' account that the fund was charged fees for FSB investigations against Nash, in his individual capacity. Marks also records in the statements prepared by her that certain invoices from counsel were paid in part by Nash, in the absence of any explanation, nor for that matter any supporting documentation. To take one example, it is indicated in relation to a matter where Marks apparently consulted counsel for the purposes of giving testimony at an unspecified enquiry that the fund paid the respondents the

sum approximating R79 000-00, whilst Nash also paid the respondents an amount of R3420-00 in the same matter. However, in this instance and other similar instances where it is indicated that Nash paid a part of a fee charged by counsel, the underlying liability of Nash, and more importantly the fund, is not explained.

[30] The amount stated in the column relating to the fees charged by counsel was more often than not, far less than the amount which is stipulated in the correlating column relating to the amount apparently paid by the respondents to counsel (apparently for other matters also). Moreover, as already indicated, no supporting documents and/or details are given by Marks with respect to the allocation of amounts apparently paid to counsel, either in the form of a break-down or in terms of clients. In the column relating to the amounts charged by advocates, these amounts are sometimes specified as globular amounts, and sometimes in the form of two amounts, apparently comprising the amount charged by the advocate concerned and VAT. In some instances, it appears that the VAT component of fees allegedly charged by counsel, as reflected on the statement prepared by Marks, is wrongly calculated. In some instances, the amounts in the correlating columns do not appear to tally.

[31] As already indicated, there is no continuous column for a running balance (either in debit or credit) between the fund and the respondents in the statements prepared by Marks. Also, unlike the founding papers, no supporting vouchers in the form of bank statements and/or trust and practice account statements are annexed to the statements of account filed by the respondents, nor does Marks indicate whether such vouchers are available. In addition, the said statements do not make reference to a number of invoices from the respondents, which are annexed the founding papers. Be that as it may, notwithstanding the problematic aspects referred to above, there appears to be nothing in the statements prepared by Marks to gainsay the payments made by the fund to the respondents reflected in the bank statements and cash book records annexed to the founding papers, nor does it appear that Marks disputes such payments.

[32] On receipt of the second set of statements, the applicant's attorneys again conveyed to the respondents' attorneys by way of a letter dated the 5th of December 2011, that the said second set of statements of account were also inadequate in terms of the court order, primarily by virtue of the fact that no detailed written statement was furnished by the respondents in respect of the applicant's liability in relation to all disbursements referred to in the founding papers. The applicant's attorneys accordingly objected to the second set of statements delivered on the basis that there was no "*meaningful explanation of how payments were allocated*", by reference to the underlying reasons for the liability of the fund, as contemplated in the court order. To take the most glaring example in this regard, Marks did not explain in the statements prepared by her the underlying reason for the large amounts of numerous payments by the fund to the respondents, allegedly for counsel's fees, in respect of criminal proceedings against Nash. Similarly, there was no explanation by Marks for the fund's liability for payment of counsel's fees to the respondents, allegedly for matters which did not appear to relate to the fund.

[33] After the second set of statements were filed by the respondents, the applicant elected not to supplement its founding papers, as provided in the notices of motion. All the applications were then set down for hearing on the 6th of December 2011 and the matters then came before this court during the week of the 6th of December 2011.

[34] It is on record that prior to the hearing before this court, the respondents' attorneys tendered to furnish the applicant further supporting documentation by January 2012, in an attempt to have the matters removed from the motion roll in December 2011, without conceding that the respondents were in fact obliged to render a more detailed statement of account to the applicant. Thus, a tender was made by the respondents to furnish the applicant the following additional supporting documentation:

- the respondents' own accounts to the fund in which provision for counsel's costs was claimed (which were described as the source documents for entries under the heading "*Narration on respondents* *account for advocate and already authorised"* in the statements of account filed by the respondents);

- Proof of payment received from the fund for in respect of "*each and every provision for counsel payment claimed"* (which was also described as the source documents for entries under the heading "*Amounts paid by Cadac Fund"* in the statements of account filed by the respondents); and
- "*Proof of payment to the counsel in respect of each and every provision for counsel payment claimed"* (which was also described as the source documents for entries under the heading "*Date of payment to advocate and amount paid"* in the statements of account filed by the respondents).

This tender for the stated additional accounts was not accepted by the applicant and the applications were not removed from the opposed motion roll on the 6th of December 2011.

[35] As already indicated, at the commencement of the hearing before me, the respondents applied for a postponement of all the applications and the said applications were dismissed by me for the reasons already given. Whilst counsel for the respondents remained in court after the said applications for postponement were dismissed, no further submissions on the merits of the applications were made on behalf of the respondents.

SUBMISSIONS RELATING TO RESPONDENTS' STATEMENTS OF ACCOUNTS

[36] Against this background, counsel for the applicant contended that save for the limited and inadequate "*narration"* in the statements of account prepared by Marks, the said statements did not incorporate a "*detailed statement"* as contemplated in the court order, nor did such statements provide "*full written reasons"* for the liability of the fund in respect of counsel's fees for matters referred to in the founding papers. Thus, it was contended that the said statements did not comply with the court order.

[37] It was also averred on behalf of the applicant by way of heads of argument

relating to each case that the lacunae in the statements of account prepared by Marks relating to the reasons for the liability of the fund were exacerbated by certain anomalies, discrepancies and inconsistencies which were evident in the said statements. These lacunae, anomalies, discrepancies and inconsistencies can be summarised as follows in relation to each matter:

A **Case number 2011/31374**

i) An alleged invoice from counsel in the sum of R88 578-00 dated 28th of February 2008, relating to an *ex parte* FSB inquiry against Nash, which is attached to the respondents' statement of account, and which was not in the possession of the applicant at the time Brand deposed to his founding affidavit, appears to be different from other invoices from the same counsel. Moreover, the VAT component of this alleged invoice is incorrectly computed. In addition, the reasons for the fund's averred liability for this invoice as well as other invoices relating to an *ex parte* enquiry and/or criminal proceedings against Nash are not explained.

ii) Whilst the statements of account prepared by Marks make reference to a specific invoice number (not included in the founding papers), in respect of which the fund paid a specified amount, the said invoice is not attached to the statements nor is there any supporting documentation in this respect.

iii) Whilst it is indicated that the fund paid the sum of R8208-00 for an invoice in the sum of R2 736-00, and the further sum of R148 470-00 for an invoice in the sum of R116 280-00, the allocation and appropriation of the surplus paid is not explained.

iv) For reasons which are also not explained, it is further indicated in the statements prepared by Marks that the fund paid certain invoices relating to Nash in part only, with Nash paying a part. No supporting documentation is enclosed in this respect nor is the basis of the averred part-payments by the fund and Nash explained. Moreover, in many instances, even though the statements prepared by Marks reflect that the fund paid an invoice in part only, it appears from the relevant bank statements of the fund, which are annexed to the founding papers, that the fund in fact paid the said invoice in full. Thus, for example, whilst Marks indicated that the fund paid an amount of R298 416-00 in respect of an invoiced sum of R363 888-00 relating to criminal proceedings against Nash, the relevant bank statements of the fund, annexed to the founding papers, indicated that the said invoice was paid in full by the fund. Similarly, whilst it is further indicated by Marks that payment in the sum of R82 080-00 was made by the fund in respect of an invoice in the sum of R84 816-00, the fund's bank statements and cash book records, attached to the founding affidavit, reflect that the said invoice was paid in full by the fund.

v) It is also indicated in the statements prepared by Marks that an invoiced amount which is blacked out in an annexure to the founding papers is in fact the sum of R306 432-00. However, whilst Marks indicates in this respect that Nash paid the sum of R274 424-00 in respect of the said invoice, it appears from the relevant bank statements of the fund, which are annexed to the founding papers, that the fund in fact paid the said invoice in full.

B **Case number 2011/31377**

i) In flagrant disregard of the court order, the respondents' statements of account to the applicant only makes reference to 13 of the 37 invoices referred to in the founding papers. The 24 invoices which have not been addressed have a cumulative value of R355 477-00.

ii) As regards the 13 invoices which are referred to in the statements prepared by Marks, the reasons for the underlying liability of the fund in each case is not explained, even though all these invoices relate to other entities such the Lifecare Group, Powerpack Pension Fund and to matters unrelated to the affairs of the fund, such as criminal proceedings against Nash.

iii) Marks also gives no explanation in her statement with respect to the allocation and appropriation of an admitted lump sum payment by the fund in the sum of R167 850-00.

iv) One invoice, being invoice number 5230, referred to in the founding papers is also referred to in the statements prepared by Marks, but the copy annexed to the statements prepared by Marks is completely different to the copy of an invoice with the same number, annexed the founding papers. Thus, invoice number 5230 attached to the founding papers relates to the matter of FSB and Others v the Lifecare Group Fund and others, (which is obviously unrelated to the fund), and invoice number 5230 attached to the statements prepared by Marks which is typed in a different font, is entitled "*IN THE MATTER BETWEEN CADA PENSION FUD*" (*sic*).

v) Even though Marks records in the statements prepared by her that more than the invoiced amounts of certain invoices were paid by the fund, she does not explain the allocation and appropriation of the surplus paid by the fund.

vi) It appears that the VAT component of two invoices are incorrectly calculated, resulting in the fund being charged double for VAT.

vii) Inexplicably, a number of invoices, including invoices in the amounts of R59 850-00 and R25 650-00, relating to another pension fund (unrelated to the fund) have the word "*paid*" (apparently by the fund) reflected on the copies of the said invoices, annexed to the statements prepared by Marks, but not on the copies provided by her to the applicant, which are annexed to the founding papers.

viii) Whilst Marks indicated in her statement that the fund paid the sum of R22 800-00 in respect of an invoice from an advocate, dated March 2010 in the amount of R80 712-00, relating to a so-called "*first section 14 application*", it appears that the fund also received an invoice from the respondents dated 26th March 2010 in the amount of R339 030-00, which incorporated the above advocate's invoice to the respondents. It also appears from the fund's bank statements that the latter invoice from the respondents incorporating the former invoice from the advocate concerned was paid in full by the fund on the 31st of March 2010.

C **Case number 2011/31378**

i) As with the other matters, no reasons or explanation are given for the averred liability of the fund for the legal costs of criminal proceedings against Nash. Thus, for example, whilst it is indicated in the statements prepared by Marks that the fund paid an amount of R 65 700-00 as part payment of an invoice in the sum of R99 864-00 in relation to criminal proceedings against Nash, no explanation is given with respect to the reasons for such part payment nor is any supporting documentation provided.

ii) An invoice from a particular senior counsel, which was not in the possession of the applicant at the time when Brand deposed to the applicant's founding affidavit, appears completely different from other invoices from the very same counsel, which were previously provided to the applicant.

D **Case number 2011/31386**

i) As with the other matters, no explanation is given for the averred liability of the fund for the legal costs of criminal proceedings against Nash.

ii) As regards invoices which Marks indicated were paid in part by the fund, and in part by Nash, no explanation is tendered with respect to the basis of such payment, nor is any supporting documentation attached to the statements prepared by Marks. In certain instances, whilst the founding papers indicated that the descriptions on invoices furnished to the applicant are blacked out Marks indicated in her statements that the said invoices relate to Nash, without providing the underlying reason for the payment of such invoice by the fund. Similarly, the reasons underlying part payment by the fund of invoices relating to Nash is not explained. Thus, for example, whilst Marks indicated that the fund paid the sum of R160 760-00 in respect of an invoice in the sum of R350 208-00, she does not stipulate the reasons for the fund's liability.

iii) Copies of certain invoices annexed to the founding papers differ from copies of the same invoices annexed to the statement prepared by Marks. Thus, whilst copies of certain invoices, which were furnished to the applicant by the respondents, have the references to 'Simon Nash' or other information blacked out, such references are not blacked out on the copies of the same invoices, which are annexed to the statements prepared by Marks. Furthermore, whilst one invoice relating to "*Power Pack (in liquidation) v Midmacor Industries & Nash, Simon"*, which is annexed to the founding papers, has a hand-written annotation to the effect that the "*account approved by Nash, Cronje and Spanier Marson (February 2008) part paid Cadac (Pty) Ltd",* a copy of the same invoice annexed to the statements prepared by Marks does not have the said annotation.

iv) It appears that one invoice is accounted for and paid twice in the statements prepared by Marks.

v) It also appears that whilst the founding papers demonstrate that certain invoices (not relating to the fund) were paid by the fund, Marks simply records in the statements prepared by her that the said statements were paid, without supporting documentation, and without reflecting that the fund had paid same.

vi) Whilst it is indicated that the fund paid an amount of R75 188-00 for an invoice in the sum of R41 040-00, the allocation and appropriation of the surplus paid is not explained.

vii) Whilst Marks records a payment of the sum of R39 648-00 by the fund in respect of an invoice not referred to in the founding papers, she does not annex a copy of the said invoice to her statement.

E **Case number 2011/31387**

i) As with the other matters, no explanation is given with respect to the reasons for the fund's liability for the legal costs relating to other entities such as Outdoor Lifestyle Holdings, and to various unspecified matters and criminal proceedings against Nash.

ii) Whilst it is indicated in the statements prepared by Marks that certain invoices relating to Nash were only partly paid by the fund, the reasons for such averred part payment by the fund is also not explained. Thus, by way of example, even though it is indicated that an invoice relating to criminal proceedings against Nash in the sum of R141 450-00, was partly paid by the fund in the sum of R91 200-00, no explanation is given as to who paid the balance, nor is any supporting documentation annexed. Similarly, it is also indicated, for some unexplained reason, that the fund paid the sum of R79 800-00 for an invoice, whilst Nash paid the sum of R3240-00 for the same invoice. The statements in this regard are also not supported by any documentation nor does Marks indicate if supporting documents in this respect are available.

iii) It is indicated in the statements prepared by Marks that the total amount payable in respect of an invoice in the amount of R84 132-00 is in fact R90 624-00. However, it appears that the applicable VAT in this respect was wrongly computed by Marks on her statements.

iv) It also appears that the copies of a number of invoices annexed to the founding papers are blacked out by computer (and not manually), whilst copies of the same invoices annexed to the statements prepared by Marks are not blocked out at all.

v) Even though Marks records in the statements prepared by her that more than the invoiced amounts of certain invoices were paid by the fund, she does not explain the allocation and appropriation of the surplus paid by the fund.

[38] It was accordingly contended by the applicant's counsel that the fundamental concern, which is articulated in the founding papers, relating to the liability of

the fund to the respondents, was effectively circumvented by the respondents. To take the most glaring example, it was emphasized that the statements filed by the respondents gave no explanation with respect to the basis for the fund's liability to the respondents for alleged disbursements in relation to criminal proceedings against Nash. It was also contended that the inadequacy of the statements filed by the respondents was exacerbated by the discrepancies and anomalies referred to above.

[39] The applicant's counsel also contended that the manner and form of the statements filed constituted an abuse of the court process. It was accordingly averred that this court had the inherent power to grant the monetary relief claimed in each case, without giving the respondents a further opportunity to comply with the mandatory provisions of the court order.

LEGAL FRAMEWORK

[40] As regards the inherent powers of the court in circumstances where there is non-compliance with a previous court order, I was referred to the case of *Athmaram v Singh* 1989(3) SA 953 D &CLD to support the averment that this court had the inherent power to grant the monetary relief claimed in each matter before me. Similar to the applicant in the present cases, the plaintiff in the *Athmaram* case had initially claimed payment of monies as well as a statement and debatement of account from the defendant. Also similar to the present cases, prior to the determination of the plaintiff's monetary claim in that case, a court order was granted in terms of which the defendant was compelled to render a statement and debatement of account. The court granting the order for delivery of a statement of account against the defendant also ordered the hearing of the monetary claim of the plaintiff to be adjourned to commence *de novo* after the said statement of account was delivered by the defendant to the plaintiff. When the defendant in that case did not deliver the statement of account in terms of the previous court order, judgement for the monetary claim of the plaintiff was subsequently granted by the court in the absence of the defendant, and without the prior knowledge of the defendant.

[41] The *Athmaram* matter came before Nienaber J when the defendant in that case applied for a rescission of the judgement for payment of monies granted against him in his absence. To the extent that it is relevant to the present applications, it may be mentioned that the court granted the said application for rescission *inter alia* on the basis that the defendant had advanced a reasonable explanation for his default in delivering a statement of account and he had, in any event, subsequently delivered a statement of account by the time his rescission application was heard. Be that as it may, on the basis of submissions made to the court, the learned Judge was also called upon to deal with the issue of the legal efficacy of the judgment for the plaintiff's monetary claim against the defendant in that case (instead of a contempt of court order) pursuant to the defendant failing to comply with a previous court order to furnish a statement of account. The court held in this regard that in terms of the court's inherent general power to prevent an abuse of its process, and to make its orders effective, the proper administration of justice demanded intervention in the form of a monetary judgment in the circumstances of that case.[4] Thus, the learned Judge found that after the defendant had failed to furnish a statement of account in terms of a previous court order, the court which granted the monetary claim of the plaintiff was legally competent to dismiss the defence of the defendant in that case. The *ratio* for the court's finding in this regard was explained on the basis that the court granting judgment for the monetary claim of the plaintiff had effectively struck out the defence of the defendant and that:

"*Once the defence was struck out judgement had to follow*"[5].

[42] For similar reasons, in the case of *Federation of Governing Bodies of Schools v MEC for Education* 2002(1) SA 660 TPD at 679 H-I, the court held that no purpose would be served in granting an order for contempt of a mandatory court order relating to consultation in the context of the closure of a pre-primary school, in the particular circumstances of that case.

[43] As regards the principles relating to the statement and debatement of an

4 Page 956 B-D and the authorities referred to by the court
5 Page 956 E-F

account, as indicated by Holmes JA in the case of *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971(3) SA 760 AD at 762F to 763D the right to receive an account can obviously be premised upon a fiduciary or a contractual relationship. In setting out the applicable guidelines in this context, the learned Judge also stated the following:

> “ *1. …*
> *2. …*
> *3. …Ordinarily the parties should first debate the account between themselves….*
> *4. …*
> *5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.*
> *6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).*
> *7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.”*

[44] In *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shellbourne Associates and Others* 1986(2) 623 (T) 638 F-G, Slomowitz AJ (with whom Eloff and Le Roux JJ concurred) noted that the existence of a duty to account is a separate issue from the adequacy of an account rendered, which in turn is a separate issue from the accuracy of the account (generally addressed at the debatement stage). Thus, it was further indicated that issues pertaining to debatement emanate not so much from a duty to deliver the account in the first instance, but from the failure to ensure its accuracy. Be that as it may, similar to the principles enunciated in the *Doyle* case, it was accepted that it may in particular circumstances be convenient to address adequacy (and correctness) together at the debatement stage.

[45] On the basis of the above authorities, as already indicated in the context of correspondence between the legal representatives in this case, Binns-Ward J, in the *Grancy Property* case*, supra* restated the fact that the nature and adequacy of an account to be rendered in any particular case will necessarily depend on the nature of the relationship between the parties, which gives rise

to the duty to account. The learned Judge also stated that the correctness of an account rendered may conceivably not be amenable to a properly directed debate by reason of the inadequacy of the information contained in such account. Thus, he held that in such a case it may in certain circumstances well be appropriate to require the amplification of an inadequate account before any debatement thereof is entertained.[6]

LEGAL ISSUES

[46] Against this background, it is necessary to determine whether the present applications for payments of the amounts claimed by the applicant in each case can be granted by this court. As already stated in this regard, even though all the present applications are opposed, the respondents elected not to file answering affidavits within the time limits prescribed by the rules. Furthermore, apart from the very short affidavit from Marks confirming that she had prepared the statements of accounts filed, and apart from certain cryptic descriptions by her in the said statements, Marks did not provide a comprehensive written statement, either in the form of an affidavit or otherwise. In these circumstances, it was averred on behalf of the applicant that as the respondents did not render "*a detailed statement of account in respect of all disbursements for which the* [fund] *is liable to pay the respondents"*, as envisaged in the court order, and as the respondents did not furnish "*full written reasons for such alleged liability"*, as provided in the court order, the inadequate statements of accounts filed by the respondents constituted an abuse of this court's process. It was accordingly contended that the statements of account rendered by the respondents merely constituted dilatory tactics to frustrate the enforcement of the court order, and the subsequent conduct of the respondents thereafter, including the applications for a postponement of these matters, simply perpetuated such abuse.

[47] Before assessing the averred abuse of this court's process by the respondents, I am of the view that it is important to contextualize both the nature and extent of the respondents' duty to account in these circumstances, and the adequacy of the accounts rendered by Marks.

6 Paragraph 9

[48] At a general level, as regards the duty to account by an attorney to a client, it seems to me that the well-established rules, practices and the statutory framework for accounting between attorney and client are generally applied and enforced by attorneys almost intuitively, as a fundamental component of the fiduciary relationship between an attorney and a client. It is also pertinent in the present context that the client concerned is a pension fund, which is obviously also managed on the basis of fiduciary relationships between the trustees and/or managers of the said fund and its members. Be that as it may, in very simple terms, there can hardly be any doubt that an elementary feature of an attorney accounting to a client for the payment of disbursements in respect of counsel's fees, must necessarily involve notification by the attorney concerned to the client concerned of the underlying reason for the liability of the client concerned for the payment of each and every such disbursement. This is *a fortiori* so when the attorney concerned is accounting to a pension fund, as in the present case. In addition, there can also be little doubt that the allocation and appropriation of disbursements by the attorney concerned pursuant to payments by a client must necessarily constitute a defining feature of accounting by the said attorney to the client concerned. In my view, this aspect is so entrenched in the applicable rules, practices and the statutory framework, that even in the absence of the court order in this matter, it almost goes without saying, that both the fund and the applicant were entitled to be informed in writing of the underlying basis upon which the fund was made to pay specified invoices for alleged disbursements to counsel from time to time. In these circumstances, it must be accepted that the respondents had a duty at all material times to account to the fund in respect of the allocation and appropriation of all payments made by the fund to the respondents from time to time.

[49] As regards the adequacy of the accounting rendered by the respondents in these matters, it is significant that the pervading theme in the founding papers was that the fund was not liable to the respondents in terms of the invoices annexed to the founding papers. Thus, counsel for the applicant correctly contended in these circumstances that the respondents had effectively

evaded the issue of the fund's liability in relation to each of the invoices specified in the founding papers, by rendering inadequate statements of account which simply did not address this issue. The inadequacy of the statements rendered, purportedly in terms of the court order, was aggravated by the fact that the said statements simply restated certain details which were already reflected in the founding papers. Moreover, the failure of the respondents to address a clear concern in the founding papers was also exacerbated by the abovestated discrepancies and anomalies in the statements provided.

[50] The conduct of the respondents was further aggravated by the fact that the respondents had initially rendered an inadequate account on the 15th of November 2011, and had subsequently filed marginally more detailed accounts on the 22nd of November 2011, only after they were advised by the applicant's attorneys that the initial accounting was wholly inadequate. Thereafter, when the respondents' attorneys were again advised after the 22nd of November 2011 that the second set of statements rendered, purportedly in terms of the court order, were also inadequate, a further tender was made by the respondents to the effect that additional information would be furnished to the applicant. Significantly, the additional documentation tendered did not appear to address the fundamental flaws in the respondents' accounting to the applicant, *vis-a-vis* the applicant's *prima facie* case in the founding papers.

[51] Against this background, I have little hesitation in finding that the respondents not only failed to comply with the unequivocal provisions of the court order, but also that they failed to comply with the basic tenets of established rules and practices relating to an attorney accounting to a client. Such continued non-compliance with the mandatory court order clearly constitutes an abuse of this court's process, particularly so as the respondents were attorneys, who had received communications from the applicant's attorneys on at least two occasions with respect to the expected (and I may add obvious) level of accounting required in terms of the court order. The abuse in this context was, in my view, further manifested by the unwarranted filing of the lengthy notice in terms of rules 35, which was justifiably not pursued by the respondents. In

addition, even though the tender to account to the applicant with additional documents was made after the 22nd of November 2011, it is pertinent that even these additional documents tendered would not have addressed the fundamental concern raised in the founding papers, if the tender was accepted.

.

[52] The question now remains whether this court has the inherent powers to grant judgment in favour of the applicant for payment of the monetary claims in each case, as contended by the applicant's counsel. Thus, the question remains whether judgment in favour of the applicant can be granted in each case on the basis of the founding papers and the statements of account rendered by the respondents, purportedly in terms of the court order. In my view, it cannot be ignored by this court in this context that even though the respondents were legally represented, they elected not to admit or dispute material facts and/or averments advanced by the applicant by way of an answering affidavit. Moreover, unlike the *Athmaran* case, where it was found that the court had the inherent power to grant judgment against the defendant in that case in the defendant's absence, after the said defendant had failed to comply with a previous court order relating to rendering an account, it cannot be ignored that the applicant in the present matters seeks judgments against respondents (who are legally represented) and who elected to render clearly inadequate statements in terms of the court order.

[53] I interpose to state in this regard that the respondents' counsel averred in the context of the applications for the postponement of the present matters that it was necessary to debate the statements of account rendered by the respondents prior to the determination of the applicant's monetary claims in each matter. Whilst meaningful debatement can, of course, only take place if there is adequate accounting, as already stated, the more fundamental issue in the present matters relates to the liability of the fund at a wider level for invoices paid by the fund. In my view, this issue obviously transcends issues pertaining to a debatement of accounts rendered by the respondents. Stated simply, if the fund is not liable to pay for specified invoices, allegedly for disbursements to counsel, the applicant must be refunded any payments in

respect of such disbursement in their entirety. Moreover, as the respondents elected not to give "*full written reasons"* with respect to the fundamental issue of the fund's averred liability, despite a court order, and despite subsequent communications from the applicant's attorneys in this regard, then any submissions pertaining to the necessity for debatement in these circumstances can only be interpreted as another dilatory tactic on the part of the respondents. In any event, for the reasons already given, the limited and contradictory information in the statements prepared by Marks rendered any meaningful debatement impossible.

[54] I was also not persuaded by the suggestion from the respondents' counsel that the applicant had effectively abandoned reliance on the claims for the monetary payments, when the court order, in the form of the alternative relief claimed, was granted in each case. As already stated in this regard, judgements for monetary payments obviously constituted the primary relief sought by the applicants in each case. As such, the court order was effectively only an interlocutory measure for the primary relief.

[55] In the final analysis, as stated by Mohomed CJ in the case of *Beinash v Wixley* 1997 (3) SA 721, at 730D-F this court is compelled to ascertain what course would best "*bring about the just and expeditious decision of the major dispute between the parties"* [7]. In the present case this "*major dispute"* can only be the monetary payments sought by the applicants. The dilatory tactics of the respondents relating to the notice in terms of rule 35 as well as the transparent attempts by the respondents not to make the mandatory court order effective, must weigh in favour of the applicants' claims. Moreover, as already indicated, it was always open to the respondents to challenge the averments in the founding papers by way of an answering affidavit, or in the form of a subsequent supplementary affidavit within the ambit of the full written statement contemplated in the court order. The respondents could conceivably also have disputed the facts relied upon by the applicant in the founding papers. However, despite the fact that the respondents were legally

7 As indicated in the cases of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948(1) SA 839 (A) 868 and *Van Streepen& Germs (Pty) Ltd v Transvaal Provincial Administration* 1987(4) SA 569 (A) 585 E-I

represented, they elected not to put forward any facts and/or averments in this regard and also effectively prevented the enforcement of the court order.

[56] Therefore, in the absence of any *bona fide* and/or tenable averments advanced by the respondents, either on oath or otherwise, pertaining to the liability of the fund in relation to the specified invoices referred to in the founding papers, the monetary relief claimed by the applicant cannot be refused. This is particularly so as it is effectively undisputed on the papers before this court that the fund made payments to the respondents in respect of matters referred to in the founding papers. Moreover, in the absence of any averments to the contrary by the respondents, it is effectively undisputed that such payments did not relate to legal costs arising from legal matters involving the fund.

CONCLUSION

[57] To the extent that payments by the fund to the respondents corroborated by bank statements are not in dispute, and in the absence of any tenable suggestions and/or reconciliations by the respondents to contradict the averments in the founding papers, the applicant has, in my view, established merely on the papers, that the fund was not liable to pay the respondents the amounts specified in the founding papers. The said amounts in each case must accordingly be repaid to the applicant. More importantly, in the circumstances of the present case, it is also my view that the respondents abused this court's process by circumventing the enforcement of the court order, notwithstanding ample opportunities to comply with the said order. Thus, the administration of justice and practical justice both demand intervention by this court in the form of monetary judgments in favour of the applicant.

INTEREST

[59] The applicant claims interest from date of demand in each case. It appears that a letter of demand was sent from the applicant's attorney to Marks on the 7th of July 2011 claiming payment of the sum of R10 929 143-10. Subsequently, as already indicated, the present applications claiming a

cumulative claim of a far lesser amount, were instituted in August 2011, requesting inter alia alternative relief in the form of a statement of account from the respondents. The court order was premised on such alternative relief. As such, specific demands for the amounts claimed in these proceedings were not made prior to the institution of the present applications. In these circumstances, I am of the view that it is fair and equitable that interest on the monetary claims by the applicant should run from the date of my judgment.

COSTS

[60] Costs in these matters were previously reserved when the court order was granted on the 12th of October 2011. It is appropriate in the circumstances for the costs of that occasion to follow the result of the present applications.

[61] The applicants also sought costs on an attorney and own client scale on the basis of the respondents' transparent attempts to frustrate the enforcement of the legitimate claims by a pension fund. Weighing all the facts which have been traversed, and taking into account the element of possible fraud (which I am advised will be investigated by the relevant disciplinary body) I agree that a punitive costs order against the respondents is warranted.

ORDER

[62] Based on the aforegoing the following orders are made:

A In relation to case number 2011/31374, the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant:

i) the sum of R615 860-48;

ii) interest on the said sum of R615 860-48, at the rate of 15.5% per annum from the date hereof to date of payment; and

iii) costs of suit on an attorney-and-client scale, including costs occasioned by the utilisation of two counsel as well costs relating to the previous hearing on the 12th of October 2011.

B In relation to case number 2011/31377, the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant:

i) the sum of R223 400-00;

ii) interest on the said sum of R223 400-00, at the rate of 15.5% per annum from the date hereof to date of payment; and

iii) costs of suit on an attorney-and-client scale, including costs occasioned by the utilisation of two counsel as well costs relating to the previous hearing on the 12th of October 2011.

C In relation to case number 2011/31378, the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant:

i) the sum of R114 000-00;

ii) interest on the said sum of R114 000-00, at the rate of 15.5% per annum from the date hereof to date of payment; and

iii) costs of suit on an attorney-and-client scale, including costs occasioned by the utilisation of two counsel as well costs relating to the previous hearing on the 12th of October 2011.

D In relation to case number 2011/31386, the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant:

i) the sum of R831 747-00;

ii) interest on the said sum of R831 747-00, at the rate of 15.5% per annum from the date hereof to date of payment; and

iii) costs of suit on an attorney-and-client scale, including costs occasioned by the utilisation of two counsel as well costs relating to the previous hearing on the 12th of October 2011.

E In relation to case number 2011/31387, the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant:

i) the sum of R603 744-00;

ii) interest on the said sum of R603 744-00, at the rate of 15.5% per annum from the date hereof to date of payment; and

iii) costs of suit on an attorney-and-client scale, including costs occasioned by the utilisation of two counsel as well costs relating to the previous hearing on the 12th of October 2011.

DATED AT JOHANNESBURG THIS 9th DAY OF JANUARY 2012.

H MAYAT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

For the applicant	:	L J van Tonder S Rose
Instructed by	:	A L Mostert Inc
For the respondent	:	J P Coetzee SC

Instructed by	:	Gildenhuys Lessing Malatji Inc c/o Rossows Leslie Inc