

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case no. 3126/16

Date heard: 24/11/16

Date delivered: 24/1/17

Not reportable

In the matter between:

QUEST PETROLEUM (PTY) LTD

Applicant

and

NORMAN GERALD LE GRANGE NO

First Respondent

MARSHA MOOTHOO NO

Second Respondent

NORMA GERRY LE GRANGE NO

Third Respondent

PEARL PATRICIA LE GRANGE NO

Fourth Respondent

JUDGMENT

PLASKET, J:

[1] The applicant, Quest Petroleum (Pty) Ltd (Quest), is a supplier of petroleum products. The four respondents are the trustees of the 5404 Stanford Road Trust (the trust) which conducts the business of a petrol filling station at 5404 Stanford Road, Gelvandale, Port Elizabeth.

[2] Quest applied, as a matter of urgency, for orders:

‘2 That the 5404 Stanford Road Trust, through its trustees, pay to the Applicant the sum of R273 343.02;

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3.1 That it be declared that the Supply Agreement concluded between the Applicant and the 5404 Stanford Road Trust . . . is valid and binding as between the parties;

3.2 That the 5404 Stanford Road Trust be ordered to comply with all its obligations in terms of such Supply Agreement, subject to the terms and conditions contained therein;

3.3 That a representative of the Applicant be authorised to attend the “Daily Wet Stock” test which the Trust is obligated to perform in terms of the Supply Agreement.

4 In the alternative to paragraph 3 above, an order be granted in terms of paragraph 3 which order shall operate as an interim order pending the outcome of an action to be instituted by the Applicant against the Trust for the same or substantially the same relief as contained in such paragraphs, which action shall be instituted within 15 court days of date hereof;

5 Costs of the Application on an Attorney and Client scale.’

[3] The trust brought a counter-application in which it sought an order:

‘1 That the 5404 Stanford Road Trust, through its trustees, pay to applicant the sum of R273 343.02 with costs on the Regional Court scale and on a simple summons basis.

2 That the remainder of the application be dismissed, with costs.

3 Alternatively to 2 above,

3.1 That the remainder of the application be referred to the Competition Tribunal to be considered on the merits in terms of section 65 of the Competition Act 89 of 1998, in particular whether clause 11.8 of the Supply Agreement is invalid, anti-competitive and in violation of the Competition Act.

3.2 That the costs occasioned thus far be costs in the cause.’

[4] The first substantive prayer for relief sought by the applicant has thus been conceded, subject to the scale of the costs that accompany it. At the outset of the argument, Mr Pienaar, who appeared for the trust, informed me that he would not take issue with the urgency of the matter.

[5] Mr Rorke, who appeared for Quest, was content to ask for an order of specific performance of the supply agreement pending the outcome of an action for final relief or, in the light of the argument raised by the trust, a referral to the Competition Tribunal.

The facts

[6] Quest had been supplying petroleum products to the trust for some time. The trust was not always in a position to pay as promptly as Quest would have liked. This led to negotiations to regulate the relationship more tightly. The negotiations resulted in two agreements being concluded on 24 March 2016. The first was a supply agreement. It is the subject of this dispute. The second was a sale agreement in respect of a half share of 5404 Stanford Road.

[7] In terms of the supply agreement, Quest was to supply petroleum products to the trust for an initial period of ten years, automatically renewable for a further five year period unless either of the parties notified the other of its intention not to continue with the agreement at least three months before the termination of the initial period.

[8] In terms of clause 6.4, on receipt of an order from the trust, Quest was required to provide it with an invoice. In terms of clause 8.1, Quest was obligated to deliver its products to the trust within 48 hours of receiving payment from the trust of the amount set out in the invoice.

[9] Clause 11.1.1 placed an obligation on the trust to purchase set quantities of Quest's products and in clause 11.1.2, the trust warranted that it had 'sufficient cash flow' to purchase these quantities. Clause 11.8.1 is an exclusivity clause. It provides that the trust 'hereby irrevocably and unconditionally undertakes that it shall for the period mentioned in clause 4.1 above and any extension thereof in terms of 4.2 or 4.3 above, order and purchase all its requirements of Petroleum Products from Quest'.

[10] The supply agreement came into operation on 14 July 2016. Whether it is still in existence and enforceable is one of the core issues in this matter.

[11] On 24 March 2016, the trust ordered petroleum products from Quest, which were delivered on the following day. It is common cause that the trust did not pay and owes Quest R273 343.02 in respect of that order. Quest has not received an order for its products from the trust since then. As a result, Quest believed that the trust was obtaining petroleum products from an alternative source, in violation of the exclusivity clause.

[12] The breach of the exclusivity clause was admitted by the trust. The first respondent stated in his answering affidavit:

‘Out of necessity the Trust has been ordering and purchasing petroleum products from an alternative supplier which is prepared to provide petroleum products on credit whereas applicant, by virtue of clause 7.1 of the Supply Agreement, is not.’

The issues

[13] Out of this set of facts, two alternative but principal defences have been raised by the trust. The first is that the supply agreement is linked to the sale agreement and because the sale agreement is no longer operative, the supply agreement is also a nullity. Linked to this is an assertion that a dispute of fact exists concerning the intention of the parties when they entered into the two agreements. The second, alternative, defence is that foreshadowed in the counter-claim, namely that if the supply agreement still operates, it is anti-competitive and its validity must be referred to the Competition Tribunal for determination.

Are the supply and the sale agreements linked?

[14] In this section of the judgment, I shall consider the question I have posed above as well as the related issue as to whether a dispute of fact exists.

[15] I shall, for purposes of determining this issue assume, in favour of the trust, that the sale agreement is no longer operative for want of the fulfilment of suspensive conditions.

[16] It is common cause that there is no specific provision in either of the agreements that makes the one's enforceability dependant on the other. There is no mention of the sale agreement in the supply agreement. There was originally one reference to the supply agreement in the sale agreement.

[17] Clause 20.2 had provided:

'The Purchaser undertakes to enter into an agreement with the Seller to Supply fuel to the Seller's filling station business with the following conditions applicable:-

20.2.1 ULP 95 – clawback amount not to exceed R_____ per litre.

20.2.2 Diesel – no rebate.'

Two parallel lines were drawn through this clause and the word 'deleted' was written between them. The deletion was signed by the signatories of the sale agreement.

[18] The deletion of clause 20.2 and the fact that it was incomplete are strong indications that there was no intention on the part of the parties to link the supply agreement and the sale agreement.

[19] The deponent to the answering affidavit has set out in detail evidence as to what he says was intended. That evidence contradicts the terms of the written agreements. The parole evidence rule is still part of our law. In *KPMG Chartered Accountants (SA) v Securefin Ltd & another*¹ Harms DP set out the position thus:

'First, the integration (or parole evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent. Fourth, to the extent that evidence may be admissible to contextualise the

¹ *KPMG Chartered Accountants (SA) Ltd v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39. (References omitted.)

document (since “context is everything”) to establish its factual matrix or purpose or for purposes of identification, “one must use it as conservatively as possible”.’

[20] The position set out in *KPMG*, particularly insofar as the parole evidence rule is concerned, has not been altered by the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,² as is sometimes suggested by counsel, or by subsequent judgments of the Supreme Court of Appeal concerned with the interpretation of contracts or other documents.³ Indeed, this very point was made by Swain JA in *B Braun Medical (Pty) Ltd v Ambasaam CC*.⁴ The learned judge of appeal, after observing that a ‘great deal of inadmissible evidence was led before the court a quo concerning the parties’ intention in concluding, and their interpretation of the terms of the contract of carriage’, cited the passage from *KPMG* that I cited above, and concluded that he did not understand anything stated ‘in later decisions of this court to constitute a departure from those principles’.⁵

[21] The evidence deposed to concerning the trust’s ‘intention’ may well be relevant and admissible when, as has been suggested, the trust claims rectification of the contract, but it is inadmissible for purposes of the interpretation of the contract in these proceedings. That being so, this evidence certainly does not create a dispute of fact, as was argued. Neither of the agreements refer to a link between them and so, even if the sale agreement has failed, that has no effect whatsoever on the validity of the supply agreement. It continues to regulate the relationship between Quest and the trust.

The competition issue

[22] In its counter-application the trust seeks an order referring the matter to the Competition Tribunal in terms of s 65(2) of the Competition Act for the tribunal to determine the validity of the exclusivity clause of the supply agreement. Section 65(1) and (2) provide:

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

³ *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111 paras 27-28. See too *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12; *Unica Iron and Steel (Pty) Ltd & another v Mirchandani* 2016 (2) SA 307 (SCA) para 21;

⁴ *B Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA).

⁵ Paras 14-15.

‘(1) Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

- (a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or
- (b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-
 - (i) the issue has not been raised in a frivolous or vexatious manner; and
 - (ii) the resolution of that issue is required to determine the final outcome of the action.’

[23] Quest opposes this relief on two bases. First, it was argued by Mr Rorke that the application for referral was frivolous; and secondly, he argued that the jurisdictional requirements for a proper referral were not present.

[24] The effect of s 65(2) is clear: if a competition issue is raised by a party, in respect of which no determination has been made by the Competition Tribunal or Competition Appeal Court, the jurisdiction of a high court is ousted and it must, without considering the merits of the competition issue, refer it to the Competition Tribunal, provided the issue has not been raised frivolously or vexatiously and it is dispositive of the matter. The position was crisply summarised by Gorven J in *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O’Farrell NO & others*⁶ as follows:

‘Under s 65(2), an ouster takes place if a certain kind of issue is raised. The issue raised must be “conduct which is prohibited”. This concept is nowhere defined. In the context of the Act, and apart possibly from issues concerning mergers, it can only mean those prohibited practices specified in the Act. For the ouster to apply, therefore, the issue raised must fall into one of four categories of practices prohibited in Chapter 2. These are restrictive horizontal practices (s 4), restrictive vertical practices (s 5), abuse of dominance (s 8) and price discrimination by a dominant firm (s 9). The merits of these issues therefore cannot be

⁶ *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O’Farrell NO & others* [2013] 4 All SA 598 (KZD) paras 7-9.

dealt with by a court. The reason for this is clear. The specialist bodies created by the Act are the only ones which may deal with the merits of issues concerning prohibited practices. There is no lack of clarity in the ouster provision.’

[25] I must first determine whether the exclusivity clause may, on the face of it, be prohibited conduct of one form or another. The trust argues, in the first place, that it is struck by s 5(1). This section provides:

‘An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.’

[26] A vertical relationship is defined in s 1 of the Act as ‘the relationship between a firm and its suppliers, its customers or both’. As the trust is Quest’s customer, the parties are in a vertical relationship. That is not disputed. In *Patensie Sitrus Beherend Bpk v Competition Commission & others*⁷ the Competition Appeal Court found an exclusivity provision – that shareholders of the appellant were required by the articles of association to deliver their entire output to the company – was an abuse of the company’s market dominance in terms of s 8(d) of the Act. I am mindful of the fact that, in this case, the context is different and the issue is whether the exclusivity clause falls foul of s 5(1) of the Act. Without involving myself in the merits in any way, it seems to me that, on the face of it, the exclusivity clause may well have the effect of preventing or lessening competition. Whether that is so is a matter left for the Competition Tribunal to decide, as is the related issue of whether, if it has this effect, it is nonetheless enforceable.

[27] It was argued that the raising of the anti-competitiveness of clause 11.8 of the supply agreement was frivolous because the trust agreed to the term when it entered the contract and such terms are common within the petroleum industry.

[28] I am unable to conclude that these two factors render the raising of the competition issue frivolous. While it is true that the trust entered into the supply agreement with its eyes open, that does not preclude it from challenging the

⁷ *Patensie Sitrus Beherend Bpk v Competition Commission & others* 2003 (6) SA 474 (CAC).

enforceability of the exclusivity clause. I would imagine that this is a fairly usual way in which competition issues arise. The fact that exclusivity clauses are standard in the petroleum industry is also not an indication that the issue is not a genuine one requiring the attention of the Competition Tribunal. Whether clause 11.8 can be justified is not for me to say: first, it lies outside of my jurisdiction and secondly, the evidence before me is scant but will, no doubt, be amplified when the issue is ventilated before the Competition Tribunal.

[29] The issue raised by the trust concerns alleged prohibited conduct in the form of a restrictive vertical practice. I conclude that the jurisdictional requirements of s 5 are present. I am satisfied that the raising of the issue was neither frivolous nor vexatious, and the Competition Tribunal's decision on the validity of clause 11.8 will dispose of the dispute between Quest and the trust, one way or the other. In the light of the above, it is not necessary for me to decide whether the jurisdictional requirements of s 8 are also present, as was argued by Mr Pienaar.

May interim relief be granted?

[30] It was argued on behalf of the trust that I do not have the jurisdiction to grant interim relief to Quest, my jurisdiction having been ousted by s 65 of the Act. Reliance was placed in this regard on *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd & others*⁸ in which Jali J had found that s 65 precluded him from granting an interim interdict. This case is distinguishable. First, it concerned a merger and mergers are treated differently to other agreements in the Act: in terms of s 13A(3) an intermediate or large merger may not be implemented until it has been approved by either the Competition Commission, the Competition Tribunal or the Competition Appeal Court. In this case, the opposite situation pertains as s 65(1) preserves the validity of the supply agreement until it is found to be invalid. Secondly, Jali J's reasoning was influenced by s 65(3) which vested exclusive jurisdiction in the Competition Tribunal and the Competition Appeal Court to interpret and apply chapters 2 (prohibited practices), 3 (merger control) and 6 (enforcement). This, he held, had the effect of ousting his jurisdiction to even consider whether the

⁸ *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd & others* 2001 (2) SA 1129 (C).

conduct complained of was a merger. Section 65(3) has since been repealed by the Competition Second Amendment Act 39 of 2000.

[31] I consider the approach taken by Spilg J in *Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd & another* to be correct.⁹ He held, in essence, that s 65(1) has the effect of preserving a high court's jurisdiction to grant interim, but not final, relief even when anti-competitive conduct is alleged. His reasoning is captured in the following passage from the judgment:¹⁰

'[58] Since section 65(1) preserves the validity of an agreement unless it is declared void or prohibited by the Tribunal or Competition Appeal Court then a party to the agreement seeking to have its terms respected in the interim must be entitled to approach a court of competent jurisdiction for relief.

[59] A High Court is competent to grant interim relief to preserve the *status quo*. Since section 65 falls outside the Competition Courts' exclusive jurisdiction, and in any event has limited jurisdiction to only confer *locus standi* on a complainant who wishes to stop an alleged prohibited practice, section 65(1) must be read in a way that preserves the right to approach a court for a remedy. This is supported also by *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and others* 1986 (2) SA 663 (A) at p676D where it was accepted that a court retains the inherent jurisdiction to grant interim relief to avoid an injustice.

[58] Moreover if the legislature intended to take away the High Court's jurisdiction to grant interim relief it would have done so in express terms or at least by necessary implication. This was not done.'

[32] In this matter, I am not required to consider, even on a prima facie basis, whether the exclusivity clause may be anti-competitive because Quest seeks the enforcement of the clause pending a determination of its validity by the Competition Tribunal. It relies on s 65(1) of the Act.

[33] I conclude therefore that a high court enjoys jurisdiction to grant interim relief even when a competition issue outside of its jurisdiction arises because s 65(1)

⁹ *Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd & another* [2011] JOL 27160 (GSJ). This judgment was followed in *Uniplate Group (Pty) Ltd v New Number Plate Requisites CC* GSJ 31 October 2012 unreported.

¹⁰ Paras 56-58.

preserves the status quo until the specialist bodies created by the Act have decided the issues within their jurisdiction.

[34] Having concluded that I have jurisdiction to grant interim relief, I turn now to whether an order of specific performance should be made, as sought in prayer 3.2 of the notice of motion, pending the outcome of a referral of the validity of clause 11.8 to the Competition Tribunal.

Specific performance

[35] It is common cause that the parties entered into the supply agreement and that the trust is in breach of that agreement in that it obtains petroleum products, on its own admission, from a supplier other than Quest, contrary to the terms of clause 11.8. I have found that the supply agreement is valid and enforceable, pending any determination to the contrary which may be made in due course by the Competition Tribunal. In terms of prayer 3.2 of the notice of motion, Quest seek an order of specific performance of the supply agreement against the trust.

[36] A court has a discretion to grant or refuse specific performance of a contract. In *Haynes v Kingwilliamstown Municipality*¹¹ De Villiers JA set out the contours of that discretion as follows:

‘It is correct, as Mr. Miller states, that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. . . This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. . .

It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.’

¹¹ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378. See too *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350; *Concerned Association of Parents & Others for Tertiary Education at Universities v Nelson Mandela Metropolitan University & another* ECG 10 November 2016 (case no. 4976/16) unreported, paras 12-14.

[37] Given that an aggrieved party has a right to specific performance, any refusal to grant specific performance in the exercise of a court's discretion will, of necessity, constitute an erosion of that right.¹² Even if no formal onus may rest on a party wishing to avoid an order of specific performance, it can reasonably be expected of him or her to deal meaningfully with why that order should not be made.¹³

[38] The trust's basis for opposing the enforcement of the supply agreement amounts to no more than a bald statement that '[i]f the Supply Agreement is to be enforced, this will most probably be the end of the filling station as it would not be able to pay for petrol'. It suggested elsewhere that its breach of the agreement should not concern Quest unduly because it could sell its petroleum products to people other than the trust.

[39] To the extent that the trust seeks to make out a case that specific performance of the supply agreement would cause it undue hardship, it has failed to place facts before me to support that assertion.

[40] Quest entered into an agreement with the trust to supply it with petroleum products and it has been denied the benefits of that agreement as a result of the trust's breach – which, the trust makes clear, it has no intention of remedying. In these circumstances, it strikes me as most inequitable to allow the trust to reap the benefits of its brazen breach of the obligations it undertook in relation to Quest. On the other hand, Quest has an agreement that remains in force and which it wishes to enforce, having been denied the benefits of that agreement, to its detriment.

[41] I am of the view that there is no basis upon which I may justifiably deny Quest its right to specific performance of the supply agreement, albeit on an interim basis until the Competition Tribunal has determined its enforceability.

The order

¹² *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782H-783A.

¹³ *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442B-443B.

[42] I shall now summarise the relief that I intend to grant.

[43] In the first place, Quest is entitled to the relief claimed in prayer 2 of the notice of motion – an order directing the trust to pay R273 343.02 – but not subject to the costs order sought by the trust in its counter-application. To that extent, prayer 1 of the trust's counter-application cannot succeed.

[44] Secondly, Quest has established its entitlement to the relief sought in prayer 3.1 of the notice of motion – a declaration that the supply agreement is valid and binding – and in prayer 3.2 – that the trust be directed to comply with its obligations in terms of the supply agreement. To that extent, prayer 2 of the trust's counter-application – the dismissal of the application with costs – cannot succeed.

[45] Thirdly, Quest has not established an entitlement to the relief claimed in prayer 3.3 of the notice of motion – that a representative of Quest 'be authorised to attend the "Daily Wet Stock" test which the Trust is obliged to perform in terms of the Supply Agreement'. The supply agreement does not give Quest the right to be present when wet stock tests are performed and no basis for this relief was put forward by Quest.

[46] Fourthly, I have found that the trust has raised properly the issue of the validity of clause 11.8 of the supply agreement in terms of s 65(2) of the Act. As a result, the order directing the trust to comply with its obligations in terms of the supply agreement will operate pending the finalisation of a referral of the matter to the Competition Tribunal. In other words, prayer 3 – an alternative prayer for the referral of the matter to the Competition Tribunal for a decision on the validity of clause 11.8 of the supply agreement – succeeds.

[47] Finally, I turn to the question of costs. An attorney and client costs order is sought by Quest. This is provided for in clause 18 of the supply agreement which reads:

'All legal costs, including collection commission, incurred by Quest as a result of any non-compliance by the Customer with any of the latter's obligations in terms hereof, shall be recovered by Quest from the Customer on the scale as between attorney and client.'

[48] Quest has been substantially successful in both its claim for the payment of the money due to it and in the enforcement of the supply agreement, albeit pending the determination by the Competition Tribunal of the validity of clause 11.8, rather than pending the outcome of a trial, as initially sought by Quest. As s 65(1) of the Act preserves the validity of the supply agreement until the Competition Tribunal has decided whether or not it is invalid, there is no reason why Quest should not be awarded its costs. In terms of clause 18, those costs will be on an attorney and client scale.

[49] I make the following order.

- (a) The 5404 Stanford Road Trust (the trust), through its trustees, is directed to pay to the applicant the sum of R273 343.02.
- (b) It is declared that the supply agreement concluded between the applicant and the trust, annexure 'JS4' to the founding affidavit, is valid and binding between the parties.
- (c) The trust is directed to comply with all of its obligations in terms of the supply agreement, subject to the terms and conditions contained therein.
- (d) The validity of clause 11.8 of the supply agreement is referred to the Competition Tribunal.
- (e) Paragraph (c) above shall operate pending the Competition Tribunal's determination of the validity of clause 11.8 of the supply agreement.
- (f) The trust is directed to pay the applicant's costs of this application on an attorney and client scale.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant: S Rorke SC instructed by Pagdens Inc.

For the respondents: B Pienaar SC instructed by Rob McWilliams Attorneys