



# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

No precedent significance

Case No: 81/11

In the matter between:

**MARTIN ROSENBERG**

Appellant

and

**NUCO CHROME BOPHUTHATSWANA (PTY) LTD**

First Respondent

**DANIELINA CORNELIA BUTLER NO**

Second Respondent

**PHILLIPUS ARNOLDUS OLIVIER NO**

**GERRIT MARTHINUS VAN ZYL**

Third Respondent

**THE ROYAL BAFOKENG NATION**

Fourth Respondent

**MOGALE ALLOYS (PTY) LTD**

Fifth Respondent

**UTHANGO MINING RESOURCES (PTY) LTD**

Sixth Respondent

**Neutral citation:** *Rosenberg v Nuco Chrome Bophuthatswana (Pty) Ltd*  
(81/11) [2011] ZASCA 203 (25 November 2011).

**Coram:** CLOETE, SNYDERS, MHLANTLA, THERON  
and SERITI JJA

**Heard:** 17 November 2011

**Delivered:** 25 November 2011

**Corrected:** 27 March 2012

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## ORDER

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**On appeal from:** North West High Court, Mmabatho (Lever AJ sitting as court of first instance):

1 The order by the court a quo is set aside and the following order substituted:

- '(a) The matter is referred to trial.
- (b) The notice of motion shall stand as a simple summons.
- (c) The applicant is ordered to deliver his declaration within 21 days from the date of this order (provided that the days between 16 December and 15 January, both inclusive, shall not be counted as part of this period).
- (d) The second respondent, the executors, are ordered to deliver their plea within 21 days of the date of delivery of the applicant's declaration (subject to the same proviso contained in (c), should the declaration be delivered before or during the period specified in the proviso).
- (e) Thereafter the proceedings shall be governed by the Uniform Rules of Court.
- (f) The costs to date shall be costs in the cause.
- (g) The applicant is directed to serve a copy of this order on the respondents other than the second respondent and the costs in connection therewith shall be costs in the cause.'

2 The second respondent, the executors, are ordered to pay the appellant's costs of appeal, including the costs of two counsel.

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## JUDGMENT

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CLOETE JA (SNYDERS, MHLANTLA, THERON and SERITI JJA concurring):

[1] The parties have, sensibly, agreed that this matter should be referred to trial. The only live issue in the appeal is who should pay the costs in this court.

[2] The second respondent, the executors who have been cited jointly, submit that these costs should be paid by the appellant as, we were informed, he had persisted in seeking final relief on motion before the court a quo up until the fifth day of the hearing in that court; and in the alternative, the submission was that the appropriate order should be that the costs of appeal should be costs in the cause. To my mind, the decisive fact is that the appellant had to come to this court to have the order of the court a quo set aside and that entitles him to the costs of appeal.

[3] The following order is made:

1 The order by the court a quo is set aside and the following order substituted:

'(a) The matter is referred to trial.

(b) The notice of motion shall stand as a simple summons.

(c) The applicant is ordered to deliver his declaration within 21 days from the date of this order (provided that the days between 16 December and 15 January, both inclusive, shall not be counted as part of this period).

(d) The second respondent, the executors, are ordered to deliver their plea within 21 days of the date of delivery of the applicant's declaration (subject to the same proviso contained in (c), should the declaration be delivered before or during the period specified in the proviso).

(e) Thereafter the proceedings shall be governed by the Uniform Rules of Court.

(f) The costs to date shall be costs in the cause.

(g) The applicant is directed to serve a copy of this order on the respondents other than the second respondent and the costs in connection therewith shall be costs in the cause.'

2 The second respondent, the executors, are ordered to pay the appellant's costs of appeal, including the costs of two counsel

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T D CLOETE  
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:

P Levenberg SC (with him P Strathern)

Instructed by Jay Mothobi Inc, Johannesburg  
E G Cooper & Majiedt Inc, Bloemfontein

SECOND RESPONDENTS: P Pauw SC (with him Ms C Hartford SC)

Instructed by Rachbuch & Associates,  
Johannesburg  
Lovius Block Attorneys, Bloemfontein