

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 141/2016

In the matter between:

KAROO WILD DIENSTE (PTY) LTD

Applicant/Plaintiff

and

GRIEQWA-LAND WEST
COOPERATIVE LIMITED

Defendant/Respondent

DG ANDRAG

1st Third Party

M LOUW

2nd Third Party

Coram: Lever J

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

Lever J

1. This is an application for leave to appeal a judgment I handed down on the 17 September 2021. In the said judgment, I granted the defendant absolution from the instance at the close of the plaintiff's case. To avoid confusion, the parties will be referred to as in the summons and Particulars of Claim. The background and circumstances that led to the plaintiff's claim are set out in my judgment, the subject of the present application for leave to appeal. Accordingly, there is no need to restate the background to the claim in this judgment.
2. In a document dated the 19 September 2021, which does not bear the Registrars date stamp, the plaintiff lodged its Notice of Application for Leave to Appeal. In the said notice, the plaintiff sets out 12 grounds of appeal.
3. Subsequently, on the 25 October 2021, the plaintiff filed its Heads of Argument. This is a document of some 12 pages in length and containing some 61 paragraphs. This document contains some grounds of appeal that are not strictly contained in the Notice of Application for Leave to Appeal. The plaintiff's Heads of Argument filed in this application, in sum sought to convince me that the plaintiff's claim was for specific performance. That in those circumstances, all the plaintiff was required to do was to (a) allege and prove the terms of the contract and (b) compliance with any antecedent or reciprocal obligations or must tender such compliance. Mr Gagiano, who appeared for the plaintiff in this application and the preceding trial, asserted in his Heads of Argument

that the plaintiff had done this. Accordingly, he asserted that the plaintiff had reasonable prospects of success on appeal.

4. Then on the 5 November 2021, when the matter was argued, Mr Gagiano took a very different tack. He now sought to base the plaintiff's claim on a cession of plaintiff's rights that was contained in the written portion of the agreement that the defendant pleaded governed the conduct of the auction. The defendant was the auctioneer conducting an auction at the behest of the plaintiff. The relevant written agreement related to the contractual relationship that came into being between the auctioneer and the buyers at the said auction.
5. This is very different to the way the plaintiff had pleaded its case and conducted the trial in this matter. Mr Gagiano sought to recharacterise paragraph 7.3 of the plaintiff's particulars of claim and submitted that the said cession would fit in with the said paragraph 7.3. Save for the identity of the parties and the issue of jurisdiction I have quoted the whole of the plaintiff's Particulars of Claim at paragraph 6 of my absolution judgment.
6. What Mr Gagiano loses sight of is that this new characterisation of plaintiff's claim is at odds with the way the plaintiff conducted its case at the trial, the way that plaintiff presented its case up to the oral argument for leave to appeal and the fact that one would now have to ignore the other material parts of the particulars of claim to give

paragraph 7.3 the meaning that the plaintiff now seeks to attribute to such paragraph.

7. Save to state that the plaintiff was not abandoning the grounds set out in the Notice of Application for Leave to Appeal and his Heads of Argument, Mr Gagiano did not mention or deal with any of the other grounds for leave to appeal in his oral argument. Accordingly, I must deal with all the substantive grounds raised in oral argument, the Notice of Application for Leave to Appeal and the Heads of Argument filed on behalf of the plaintiff. I shall refer to each ground as raised and then deal with it directly. The new reliance on the cession as part of plaintiff's cause of action has been partly dealt with already, it is convenient to finish off this aspect first before proceeding to the Notice of Application for Leave to Appeal and then insofar as it is necessary to deal with the Heads of Argument filed on behalf of the plaintiff in this application for leave to appeal.
8. Concluding the issue raised by the new reliance on the said cession as part of the plaintiff's claim, it is common cause that in conducting the relevant auction, the defendant was the plaintiff's agent. Placing emphasis on the contention that the defendant had to collect the purchase price as pleaded in paragraph 7.3 of the Particulars of Claim and arguing that the defendant must make good for a defaulting purchaser, without more being pleaded, flies in the face of an agreement of agency. This is particularly so in an auction. Normally, an auctioneer

is not liable for a defaulting purchaser. An additional term to that effect is required to be agreed between the parties. If such an additional term was reached, it must per force be pleaded. This the plaintiff has not done.

9. The evidence of Mr Van der Westhuizen, who gave evidence for the plaintiff, that he entered into the agreement on behalf of the plaintiff, simply cannot sustain this new line of attack.

10. In cross-examination Mr Van der Westhuizen was asked in relation to the conclusion of the agreement that the defendant would act as the plaintiff's agent in conducting the relevant auction, "What would happen if a person who buys game at the auction simply walks away from his obligations?". Mr Van der Westhuizen responded that it was not discussed when he, acting for the plaintiff and Mr Klopper, acting for the defendant, entered into the relevant agency agreement for the defendant to conduct the auction. In these circumstances, I do not believe that the plaintiff can rely on such cession as part of its cause of action, which in any event was not pleaded.

11. Further, in an auction a cession is usually contemplated and used to facilitate the role of the auctioneer in delivering and transferring ownership of the relevant goods to the purchaser upon payment of the relevant purchase price. It cannot be stretched further than that unless special terms have been agreed and pleaded. As can be seen from the

evidence of Mr Van der Westhuizen, set out above, there was no agreement to that effect. Resulting in the situation where this new cause of action based on the cession cannot be sustained.

12. Turning now to the grounds of appeal set out in the plaintiff's Notice of Application for Leave to Appeal. The first ground of appeal set out in such document reads as follows:

"3. *Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:*

3.1 *By finding that there is an essential averment missing from the plaintiff's particulars of claim that would establish a factual or legal basis for holding the defendant liable for the 'obligations of the respective purchasers'.*"

13. This finding referred to in the above ground of appeal is to be found in paragraph 16.7 as read with paragraph 41 of my judgment on the issue of absolution.

14. As can be seen from the prelude to these grounds of appeal, the one under discussion and the ones to follow from the Notice of Application for Leave to Appeal, has until oral argument for leave to appeal always been that plaintiff's claim is for 'specific performance'. I confirmed this in paragraph 8 as read with paragraph 28 of my judgment.

15. The plaintiff seeks to hold the defendant liable for the default of the purchasers at the auction concerned. The goods, being the game concerned are still in the possession of the plaintiff and have never left

the plaintiff's possession. The plaintiff's claim as confirmed on multiple occasions up until oral argument in this application, was for specific performance. The question arises, specific performance of whose obligations? This question cannot be avoided. As pointed out in the judgment three different contracts come into existence when an auction is conducted. Firstly, the agency agreement between the seller and the auctioneer. Secondly, the contract between the buyer and the auctioneer. Thirdly, the contract between the buyer and the seller.

16. The obligation to pay or make good the purchase price is not one of the *naturalia* of a contract of agency. The obligation to pay the purchase price can only arise in the second and third agreements referred to above. In both cases this obligation would fall on the purchaser. It would only be an obligation on the part of the auctioneer to make good on the purchase price if the agency agreement included a term to the effect that the auctioneer would warrant or guarantee performance by the purchaser. As set out above, there was no evidence to support inclusion of such a clause in the agency agreement and as can be seen, it certainly was not pleaded in the particulars of claim.

17. The second ground of appeal set out in the said notice reads as follows:

- "3. *Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:*
- 3.2 *By confusing 'the obligations of the purchasers' as anything other than the defendant's obligation to the plaintiff in terms of*

the agreement entered into on the 16 May 2015 and confirmed by the defendant at the auction;”

18. The plaintiff, in making this contention loses sight of the fact that in an auction three contracts inevitably come into existence, the first being the contract of agency between the auctioneer and the seller, the second being between the seller and the purchaser and the third being between the auctioneer and the purchaser. The plaintiff also loses sight of the fact that the *naturalia* of the agency agreement between it and the defendant does not include a term whereby the defendant would take on the obligations of the purchaser. There would have to be an additional term in the agency agreement to that effect.
19. As is set out above, plaintiff failed to plead any such additional term in the agency agreement between it and the defendant and the evidence adduced on the part of the plaintiff in the trial would not sustain the contention that such obligation on the defendant to make good the purchase price bid by the respective buyers existed in the event of a default.
20. On this ground as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

21. The third ground of appeal is set out as follows in the Notice of Application for Leave to Appeal:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.3 By finding that the plaintiff has not adduced evidence on all aspects of its claim;"

22. This ground of appeal has already been fully dealt with in dealing with the first two grounds of appeal set out in the Notice of Application for Leave to Appeal.

23. Also, on this ground as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

24. The fourth ground of appeal set out in the Notice of Application for Leave to Appeal, reads as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.4 By finding that the evidence of Van der Westhuizen and Van der Berg pertaining to Klopper's (defendant's authorised representative) to them on numerous occasions, is not confirmation of defendant's liability towards Plaintiff (as pleaded and testified to) is untenable for the purpose of an application for the (sic) absolution from the instance;"

25. Firstly, if plaintiff intends to allege herein that plaintiff had pleaded that two or any representatives of the defendant had confirmed the

defendant's liability to the plaintiff, this is not the case. No such contention has been pleaded by the plaintiff. Van der Berg and Van der Westhuizen did make this contention in their evidence.

26. The evidence of Van der Berg and Van der Westhuizen on this aspect was challenged in cross-examination. Accordingly, it cannot be said that such evidence went unchallenged.

27. Of more import, at the stage of considering absolution, is the fact that even if it can be accepted that Klopper and Bosman made remarks to the effect that they believed that the defendant was liable to the plaintiff, the plaintiff still had to plead the basis on which the defendant accepted liability of the obligations of the respective purchasers who reneged on their respective obligations to pay the amount bid by them at the auction. This was not done.

28. Any confirmation of the defendant's liability towards the plaintiff's witnesses, in the absence of a special term making provision for such liability in the agency agreement, such confirmation would fly in the face of the agency agreement pleaded by the plaintiff. Consequently, this contention is untenable and cannot be sustained on the pleadings and evidence currently before the court.

29. The argument under this ground for leave to appeal is untenable. There is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I

cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

30. The fifth ground of appeal in the said Notice is set out as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.5 By disregarding what was by the Defendant's counsel, Klopper and the other representative Bosman on behalf of the defendant, and the first third party would testify to in regard to defendant's version of the agreement entered into between the parties, as pleaded, and testified to by Van der Westhuizen and Van der Berg;"

31. What is set out in paragraphs 28 to 31 above is applicable to this contention made by the plaintiff.

32. On this ground as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

33. The sixth ground of appeal set out in the said Notice reads as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.6 By finding 'that the litigation arises out of an auction conducted by the defendant at the behest of the plaintiff' whilst it is common cause that the litigation arose because of the defendant's failure to comply with its obligation in terms of the agreement entered into between the parties regarding payment of the game sold to Andrag and Louw at the auction;"

34. Whilst plaintiff pleaded a claim against defendant for the sums owed by the first and second Third Parties, no underlying basis that would support the plaintiff's claim was ever pleaded by the plaintiff. Also, the evidence adduced by the plaintiff at the trial did not support any such claim.

35. In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

36. The seventh ground of appeal set out in the said Notice reads as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.7 By concluding in paragraph 4 'For various reasons not fully known at this stage and which are also not material to the present application both third parties (the purchasers) either did not follow through or defaulted on their respective obligations...' the Court misdirected itself. Having found that there was a material averment missing from the plaintiff's particulars of claim, being that defendant was liable to the plaintiff for the purchase price of the game, in the event of Andrag and Louw failing to pay the defendant for the game purchased at the auction, the version of the defendant in regard hereto (disregarded by the Court), was that defendant's representative would testify, that despite numerous attempts by them, and eventually defendant's managing director Wim van Rooyen, Andrag simply refused or avoided delivery. The Court's speculation that Bosman was merely attempting to facilitate delivery as part as part of his duty as an agent is wrong, especially if regard is had to the fact that the learned Judge was dealing with evidence to be considered at the stage of an application for absolution. Again it is trite law that if judging evidence at the stage of absolution there

are two or more versions the Court is not to speculate on which version should prevail, but find in favour of the plaintiff;”

37. In my view, nothing turns on the argument set out in this ground of appeal. Even if it is accepted that Bosman attempted to facilitate the delivery of game his conduct, as such, does not justify an inference (which must be reasonable) that the defendant’s representatives considered the defendant to be bound to make good to the plaintiff the obligations of the purchasers to the plaintiff in circumstances where such purchasers reneged on their obligations to the plaintiff.

38. In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

39. The eighth ground of appeal set out in the aforesaid notice reads as follows:

"3. Having found correctly that the plaintiff’s claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.8 In concluding in paragraph 8 of the judgment that the Plaintiff ‘seeks specific performance from the defendant in respect of the obligations of the purchasers...’ and concluding that ‘The particulars of claim quoted above allow of no other reasonable interpretation’. Again, the Court misdirected itself in finding that it is at the stage of absolution called upon to interpret the particulars of claim. The particulars quoted are to be accepted as pleaded;”

40. Plaintiff pleaded that the defendant would sell certain wild game at auction on plaintiff's farm Jakhalsdans on behalf of plaintiff. Further, that defendant would collect the proceeds of the respective sales and after tender of delivery by plaintiff would pay over the proceeds thus collected to the plaintiff. This is the case as pleaded by the plaintiff.

41. The case pleaded by the plaintiff has inescapable consequences that would apply in these circumstances unless the plaintiff pleaded a special term in the contract of agency between it and the defendant. Although I used the phrase 'would allow of no other reasonable interpretation', in the judgment, no interpretation is required. It flows from the plaintiff's pleadings. One of those inescapable consequences would be that the purchaser would pay the price for the goods he had bid at the auction. No special term was pleaded by the plaintiff that would make defendant liable for this obligation that fell on the buyer. The *naturalia* of the contract of agency between plaintiff and the defendant would apply in the absence of the special term in the contract of agency already referred to above.

42. This brings me to the *dicta* of Harms JA in the matter of GORDON LLOYD PAGE & ASSOCIATES v RIVIERA & ANOTHER¹ the relevant passage is quoted at paragraph 11 of the judgment. This *dictum* asserts

¹ 2001 (1) SA 88 at 92E – 93A.

that there must be evidence acceptable on the face of it on all aspects of the plaintiff's claim to avoid absolution from the instances.

43. As can be seen from the above: firstly, plaintiff has not pleaded a necessary term of the agency agreement in order to support its claim; and secondly, plaintiff has not led evidence on all aspects of its claim, never mind the requirement that such evidence should be acceptable on the face of it. Such evidence to support defendant's liability to pay the purchase price, owed by the purchaser to the plaintiff, is simply not there.

44. In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

45. The ninth ground of appeal set out in the aforesaid Notice reads as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.9 In disregarding paragraph 9.3 of the defendant's amended plea dated on the day the trial resumed before the learned Judge, by which the defendant for the first time allege (sic) that the first third party had cancelled the sale of the swart rooibok with Mr Van der Westhuizen '...ten gevolge waarvan die Verweerder geen verdere verpligtinge met betrekking tot die voormelde swart rooibok teenoor die Eiser gehad het nie...' When considering at the stage of an application for absolution, whether there is evidence upon which a reasonable man might find for the plaintiff, the evidence has to be judged against the background of the pleadings."

46. Even if the defendant's amended plea is relevant at the stage of absolution, such amended plea in my view amounts to nothing more than a statement that once there had been a consensual cancellation between the plaintiff and the first third party there can be no claim on any basis for the defendant to make good the failure of the first third party to pay the purchase price. In my view such amended plea does not amount to an admission that there is or ever had been a basis for plaintiff to claim the fulfilment of such obligation from the defendant.

47. In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

48. The tenth ground of appeal set out in the relevant Notice reads as follows:

"3. Having found correctly that the plaintiff's claim against the defendant is for specific performance, the Court erred and/or misdirected itself:

3.10 The learned judge erred in applying the approach adopted in the case of SPRINGFIELD OMNIBUS SERVICE DURBAN v PETER MASKELL AUCTION CC and ANOTHER, as being applicable to the circumstances governing the auction in the present matter. The auction in that matter was simply a normal auction, not subject to any specific terms contained in an agreement entered into between the seller and the auctioneer prior to the auction."

49. The passage quoted in the Springfield Omnibus matter² referred to in paragraph 16.1 of the judgment, sets out the three contracting parties involved in an auction, deals with the three distinct contracts and contractual relationships that come into existence when an auction is conducted. The passage is of such general application that it is only in rare instances when it would not apply. The only instance where it would not apply that I can think of is possibly when the auctioneer sells his own goods on auction. Then the contractual relationships set out in Springfield Omnibus case would not apply. It certainly cannot be distinguished on the basis that plaintiff seeks to distinguish it from the instant case.

50. In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

51. The eleventh and twelfth grounds of appeal set out in the aforesaid Notice have already been dealt with.

52. Turning now to deal with what plaintiff contends in the Heads of Argument filed on its behalf, insofar as such arguments are not set out and already dealt with as a ground of appeal in the Notice of Application for Leave to Appeal.

² 2006 (4) SA 188 (NPD) at 1911 to 192C.

53. I will not be setting out the averments made in the plaintiff's Heads of Argument as this will make an already cumbersome judgment unmanageable, but will deal with the arguments raised to the extent necessary by referring to the relevant passages in the plaintiff's Heads of Argument. Where appropriate and where paragraphs are interrelated or deal with the same issue in the application for leave to appeal, I will deal with such grounds in batches.

54. It is convenient to deal with the issues raised in paragraphs 7 to 13 of the plaintiff's Heads as the first set of issues I need to canvass in the said Heads of Argument.

55. The defendant's version, including its instructions from Klopper and Bosman had to be put to the plaintiff's witnesses when they were under cross-examination as defendant could not assume that absolution from the instance would be granted. Defendant had to lay the basis for its defence and challenge the evidence of the plaintiff's witnesses where it was at odds with the instructions and evidence provided to it in case absolution was not granted. In those circumstances if the defendant did not do so there would be no opportunity to recall the plaintiff's witnesses.

56. As has already been pointed out Mr Van der Westhuizen who gave evidence for the plaintiff, testified that the position that would prevail if one of the purchasers reneged on their obligation to pay was never

discussed with the defendant. It is not part of the *naturalia* of an agency agreement. On Mr Van der Westhuizen's evidence it could not be part of the relevant agency agreement in this matter.

57. The excerpt of the evidence quoted in paragraph 11 of the plaintiff's Heads has been taken out of context. Particularly as Mr Van der Westhuizen testified that the issue of what would happen if a buyer reneged was never discussed between the plaintiff and the defendant.

58. The statement of Mr Van der Westhuizen quoted in paragraph 11 of the Heads is nothing more than a baseless statement when he was confronted with the improbability of the defendant taking on the obligations of the purchasers who reneged on their obligations. This must also be seen in the light of the fact that no basis for holding the defendant liable for the obligations of the purchasers was pleaded by the plaintiff in its Particulars of Claim.

59. The contentions set out on plaintiff's behalf in paragraphs 14 to 16 of the Heads filed on plaintiff's behalf also stand to be dealt with as a unit.

60. The question the court was faced with at the stage of assessing the application of the defendant for absolution did not concern the credibility of the defendant's witnesses but whether the plaintiff had pleaded and established, on the basis of *prima facie* evidence on all aspects of its claim that would establish a complete cause of action.

61. The arguments set out in paragraphs 17 to 26 in the Heads filed on behalf of the plaintiff will be dealt with as a unit as they are interrelated.
62. The argument that the evidence referred to in paragraphs 17.1 to 17.3 had to be considered before absolution was granted cannot be sustained. Such evidence would only have been relevant in two circumstances: Firstly, if plaintiff's claim was not for specific performance but for contractual damages arising out of the respective breaches of the relevant agency agreement pleaded in paragraphs 17.1 to 17.3; and secondly if plaintiff had pleaded a complete cause of action. Neither of these scenarios was applicable when the court ruled that absolution from the instance be granted.
63. This court's finding on the attempts of Bosman trying to facilitate the delivery of game to the purchasers was done in an attempt to execute the defendant's obligations to the plaintiff, as its agent, is an inference that flows from the *naturalia* of the agency agreement between them. As such it is not speculation.
64. The arguments set out on plaintiff's behalf in paragraphs 27 to 32 of the Heads filed on behalf of the plaintiff are interrelated and will also be dealt with together.
65. The statement of the law as pleaded in paragraph 7.1 of the defendant's conditional claim against the third parties, which is referred

to in paragraph 28 of plaintiff's Heads, is wrong for the following reasons:

65.1. The plaintiff was never a party to the general rules of the auction.

In law those only apply between the auctioneer and the purchaser;

65.2. The general rules of an auction do not, in law, make a purchaser of game at an auction a party to the agency agreement that is concluded between the seller of game, as principal, and an auctioneer as the seller's agent;

65.3. Neither the plaintiff nor the third parties signed a service liaison agreement;

65.4. The defendant's Plea and the averments in its provisional claim against the third parties does not detract from the fact that the plaintiff had to plead and adduce evidence on a complete cause of action; and

65.5. The averments in the claim against the third parties were made provisionally, on the basis that the defendant be found liable to the plaintiff.

66. The arguments in paragraphs 33 to 38 are interrelated and will be dealt with together.

67. Whilst it may be that no exception was raised by the defendant, namely that the Particulars of Claim lack an essential averment, the

defendant could not foresee what evidence the plaintiff would lead in support of its case.

68. It is a question for the court to decide if the plaintiff's cause of action is incomplete, the view of the plaintiff's witnesses on this aspect is irrelevant.

69. In respect of the argument set out in paragraph 38 of the Heads filed on behalf of the plaintiff, plaintiff loses sight of the fact that the naturalia of an agreement of agency does not include a term that the auctioneer will stand good for a purchaser's obligations to the seller if the purchaser reneges on its obligation to pay the purchase price.

70. The other arguments set out in the Heads of Argument filed on behalf of the plaintiff have substantively been dealt with elsewhere in this ruling. It would serve no purpose to repeat them.

71. In all the issues set out in the Heads of Argument filed on behalf of the plaintiff I cannot find that there is a reasonable prospect of another court coming to a different conclusion. In the circumstances, I cannot find that the plaintiff would have a reasonable prospect of success on appeal on these or any of the other grounds raised by the plaintiff.

72. The plaintiff has not relied on sub-sections 17(1)(a)(ii), 17(1)(b) or 17(1)(c).

73. In these circumstances, the application for leave to appeal stands to be dismissed.

74. The only remaining issue is the issue of costs. Both parties agreed that costs should follow the result. I can find no reason not to follow the general rule on costs and this will be reflected in the order.

In the circumstances, the following order is made:

- 1) The application for leave to appeal is refused.
- 2) The plaintiff/applicant is to pay the costs of such application.

Lawrence Lever
Judge
Northern Cape Division, Kimberley

Representation:

Applicant: Adv GJ Gagiano – oio Engelsman Magabane

Respondent: Adv JG Gilliland – oio Van De Waal Inc.

Date of hearing: 05 November 2021

Date of Judgment: 04 March 2022