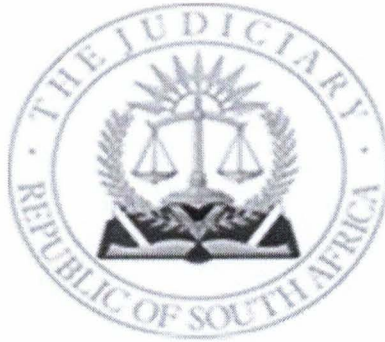




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 29179/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: YES

22 July 2021

DATE



SIGNATURE

In the matter between:

BMW (SOUTH AFRICA) (PTY) LIMITED

and

DUDU PHILY MOLAHLOE

JASON MAHALATHI

ESTEN MAHLANGU

RAMARUMO SYDWELL MOSHIGA

THABISO LEKHULENI

NOEL PHIRI

FRANS MOLOPE

THULANI MAHLANGU

Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

LUKIE SHABANGU
LAWRENCE MANGANI
JOSEPH MASEHLA
ABUBAKAR SEDIBENG
ROBERT LETSOALO
FRANS TAUATSWALA
FREDDY MOLEPO
BONOLO SONO
SYBOK MOHOME LEBITSA
JACOB KEKANA
RASEKGANO NICOLAS KGALEDI
TEBOGO MATHETE KEKENA
JABU MAHLANGU
TINYIKO MANGANI
BOITUMELO MAROPANE
BONGANI MOSIPHA
JUVENAL MUKHAWANA
GABRIEL TLOU
PHAUWE PHOSA
WILSON OUPA MASHIGO
VINCENT VUSI MONDHLANA
STATION COMMANDER:
SOUTH AFRICAN POLICE SERVICE,
ROSSLYN
SOUTH AFRICAN POLICE SERVICE
PROVINCIAL COMMISSIONER, LT GEN E
MAWELA
TSHWANE METRO POLICE
DEPARTMENT

Ninth Respondent
 Tenth Respondent
 Eleventh Respondent
 Twelfth Respondent
 Thirteenth Respondent
 Fourteenth Respondent
 Fifteenth Respondent
 Sixteenth Respondent
 Seventeenth Respondent
 Eighteenth Respondent
 Nineteenth Respondent
 Twentieth Respondent
 Twenty-First Respondent
 Twenty-Second Respondent
 Twenty-Third Respondent
 Twenty-Fourth Respondent
 Twenty-Fifth Respondent
 Twenty-Sixth Respondent
 Twenty-Seventh Respondent
 Twenty-Eighth Respondent
 Twenty-Ninth Respondent
 Thirtieth Respondent

 Thirty-First Respondent

 Thirty-Second Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 July 2021.)

JUDGMENT

MIA J

- [1] The applicant, BMW (South Africa) (Pty) Limited, is a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The first to twenty-ninth respondents were all former employees of Careers Staffing Solutions ("CSS"). CSS was sub-contracted to Bremer Lagerhaus Gesellschaft Logistics South Africa ("BLG"). BLG had a contract with the applicant to provide staff to the applicant. The first to twenty-ninth respondents are hereafter referred to as "the CSS employees". The thirtieth respondent is the Station Commander: South African Police Services, (SAPS) Rosslyn. The thirty-first respondent is the South African Police Service Provincial Commissioner, Lieutenant General, E. Mawela. The thirty-second respondent is the Tshwane Metro Police Department (TMPD) situated at 193 Napier Rd, Lyttelton Manor, Centurion. The thirtieth to thirty-second respondents were cited to assist in serving and enforcing the order.
- [2] The applicant sought relief on an urgent *ex parte* basis on 16 July 2020 against the CSS employees whose contracts came to an end. The applicant issued a *rule nisi* without a return date. The order granted by Khumalo J provided that:
- "1. *The forms and service provided for in the Uniform Rules of Court are dispensed with and the matter is treated as urgent.*
- 2.1.1 *the CSS Employees are interdicted and restrained from blocking or in any way preventing access to the Applicant's Premises, including the blocking of any of the gates or the roads leading to or from the Applicant's Premises, or disrupting the Applicant's business operations in any way;*
- 2.1.2. *the CSS Employees are interdicted and restrained from intimidating, threatening, or assaulting, the employees of the Applicant or any service providers or visitors of the Applicant;*

- 2.1.3. *the CSS Employees are interdicted and restrained from stopping, interfering with, damaging any vehicles travelling to and from the Applicant's Premises, and/or threatening the occupants thereof*
- 2.1.4. *the CSS Employees are interdicted and restrained from stopping, interfering with or preventing the Applicant's employees' access in and out of the Applicant's Premises; and*
- 2.1.5. *the CSS Employees are interdicted and restrained from unlawfully accessing the Applicant's Premises without the written permission of the Applicant.*
- 3 *In addition, the Applicant seeks an order:*
 - 3.1. *Directing and authorising the SAPS and TMPD to:*
 - 3.1.1. *give effect to the order for the relief set out above; to prevent any of the Respondents from breaching the terms of the order; and*
 - 3.1.2. *disperse, remove, eject, or arrest, persons who act in any unlawful manner and/or contrary to this order and/or who act in a manner as to contravene or reduce the effectiveness of this order.*
- 4. *The aforesaid orders in paragraphs 2 and 3 shall operate as a rule nisi returnable on a date to be arranged with the registrar.*
- 5. *All interested parties are called upon to show cause on the return date as to why the orders in paragraphs 2 and 3 should not be made final.*
- 6. *The costs of the ex parte application to be reserved for determination on the return date."*

There was no return date provided for in the order which was served on the respondents. In terms of the order, the date had to be arranged with the registrar.

- [3] The matter was set down on the opposed motion roll. The applicant sought confirmation of the interim interdict and requested that it be made final. The first to twenty-ninth respondents and the thirtieth, thirty-first and thirty-second respondents opposed the relief sought and filed opposing affidavits to the application.
- [4] The applicant employs approximately 200 hundred employees at its Distribution Centre and approximately 2000 people at its Manufacturing Plant. Some

services at its Distribution Centre are provided by service providers sourced pursuant to a tender process. These services include drivers, wash-bay and technical services. The driving services tender was awarded to BLG, who in turn appointed CSS, a labour broker. On 31 March 2020, BLG's contract expired. Pursuant to the tender process, a new service provider, namely Bidvest International Logistics(BIL), was awarded the contract. BIL did not renew the contracts of the CSS employees. The CSS employees regarded the non-renewal of their contracts as dismissals. On 9 July 2020, the CSS employees arrived at the entrance to the Vehicle Distribution Centre and sought to gain access to the premises. The South Police Service (the SAPS) were summoned to intervene. BIL engaged the CSS employees and persuaded them to leave to discuss the non-renewal of their services on another day.

- [5] The CSS employees arrived on Monday, 13 July 2020. Once again, BIL engaged the CSS employees, and they left. On 16 July 2020, the CSS employees returned to the Vehicle Distribution Centre. According to the applicant, they blocked the roads and intimidated the applicant's employees and service providers. The applicant alleged they threatened drivers of the carrier trucks entering and leaving the Vehicle Distribution Centre and even threatened to burn the trucks. Each time the CSS employees attended the applicant's premises, the SAPS was contacted for assistance. According to the applicant, the SAPS informed them they would only intervene if they had a court order. The applicant thus stated they did not seek any material relief against the SAPS and the Tshwane Metro Police Department (the TMPD) and only cited the SAPS and the TMPD as respondents to facilitate their assistance in enforcing the order.

- [6] The first to twenty-ninth respondents disputed that version of the applicant.

They stated that they were contracted by CSS to work for the applicant. They relied on s 198A of the Labour Relations Act, 66 of 1995 (LRA)¹, which provides in subsection 3:

‘For the purposes of this Act, an employee

- (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2);’

The CSS employees thus regarded themselves to be the employees of the applicant.² The respondents’ relied on this section, stating that they were

198A. Application of section 198 to employees earning below earnings threshold.—(1) In this section, a “temporary service” means work for a client by an *employee*—

- (a) for a period not exceeding three months;
- (b) as a substitute for an *employee* of the client who is temporarily absent; or
- (c) in a category of work and for any period of time which is determined to be a temporary service by a *collective agreement* concluded in a *bargaining council*, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act*.

(3) For the purposes of *this Act*, an *employee*—

- (a) performing a temporary service as contemplated in subsection (1) for the client is the *employee* of the temporary employment services in terms of section 198 (2); or
- (b) not performing such temporary service for the client is—
 - (i) deemed to be the *employee* of that client and the client is deemed to be the employer; and
 - (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

(4) The termination by the temporary employment services of an *employee’s* service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a *dismissal*.

(5) An *employee* deemed to be an *employee* of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

(6)

(7)

(8)

² *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and others* (2018) 9 BLLR 837 (CC)

employed with the applicant for more than three months, having been placed with the applicant by CSS. They also stated that they earned less than the threshold whilst employed by the applicant for longer than three months. This was acknowledged by Bidvest International Logistics ("BIL"), who took over from CSS, in a letter dated 11 March 2020.

- [7] Furthermore, the twenty-nine respondents disputed that they blocked the entrance, intimidated drivers and prevented persons from entering the premises. They state that approximately fifteen members of the union, accompanied by four officials, including the deponent to the affidavit, attended the premises and introduced themselves. They requested to speak to a person from the applicant's human resource department to address the non-renewal of their services due to the CSS contract ending. Mr Phillip Rebb spoke to them and ended the conversation by saying that he was not the ambassador for BMW and hung up the phone. Immediately thereafter, G4S security guards closed the applicant's gate and called the SAPS. The respondents moved to stand across the street on the pavement directly in front of the applicant's gate.
- [8] They waited; after a while, the SAPS arrived in 4 police vans and a VW Kombi. There were approximately 20 police officers who responded. The SAPS spoke to the respondents, who explained they were waiting for someone from CSS and/or BMW to have a meeting. The SAPS accepted their explanation and warned them not to engage in violence or commit any criminal acts. The SAPS parked near the respondents whilst they waited. Mr. Thabang Bopabe (Mr Bopabe) from CSS finally arrived at 2 pm and informed them that CSS was still trying to settle the matter. He asked the respondents to return the following day whilst he tried to arrange a venue for a meeting. They left and returned on 10 July 2020. Upon their return, they stood in the same spot across the road and requested security to call Mr Bopabe. The SAPS arrived shortly thereafter, enquiring about their presence. They explained again that they were requesting a meeting with CSS or BMW. Officer Makhabele then approached the applicant, and representatives from CSS and BIL met with the respondents.

- [9] The representatives were amenable to a meeting, but the applicant would not allow them to use its facilities. It was suggested that they meet in Isando at the applicant's manufacturing plant. Upon their arrival at Isando, they could not access the premises, so they went home. On 13 July 2020, they returned to the applicant's premises once more to hand over a memorandum they had prepared. A large number of police officers were already there when the respondents arrived. The respondents requested security to call someone to receive the memorandum. However, this request was refused. The respondents denied attending the premises of the applicant on the 14th and 15th July 2020. They returned on 16 July 2020 to hand over the memorandum. The SAPS arrived a few minutes after they arrived. They explained once more the reason for their presence. Eventually, Mr PM Dantjie, from BMW, came out and received and signed for receipt of the memorandum. The respondents left thereafter and did not return to the premises.
- [10] On the same day, some union members received notice of the application via WhatsApp in the evening. They tried to access the court file but were not afforded access to the court to examine the court file to ascertain whether an order was granted or not. Some of the respondents did not receive the notice of the application at all. They thus did not accept that an interim order was granted.
- [11] The thirtieth and thirty-first respondents similarly opposed the relief on the basis that an order was obtained against the SAPS without citing the relevant Minister, the National Commissioner, or even the Provincial Commissioner of SAPS, in an urgent application whereby the co-operation of the SAPS was sought. Furthermore, the *rule nisi* was not served on the relevant respondents. The thirtieth to thirty-first respondents took issue with the manner in which the respondents were referred to in the heading of the draft order, which differed significantly from the heading of the notice of motion and in the founding affidavit. The Station Commander Rosslyn was not identified in the application, and the application was not served on the thirtieth respondent at any stage. After the order was granted on 16 July 2020, the applicant served the order on

17 July 2020 at 13h15 on Colonel Gininda at the Akasia South African Police Services and not on the SAPS Rosslyn.

- [12] Colonel Gabriel Johannes Alberts deposed to the affidavit on behalf of the thirtieth to thirty-second respondents, raising an issue with the request for a mandamus against the SAPS. He contended that the applicant's conduct to move the application on 16 July 2020 without proper notice to the SAPS and the Minister or even proper service of the papers was not only irrational, ill-thought and capricious but also irresponsible and an abuse of court process. This was so especially given the limited resources of the police during the Covid pandemic. On the SAPS' version, only twenty persons were outside the premises. They posed no threat and did not threaten or intimidate anyone.
- [13] Colonel Alberts disputed that the SAPS failed to act and that its failure constituted a dereliction of a statutory duty that infringed or threatened to infringe the applicant's rights or the general populace. He referred to the SAPS records, which indicated that a complaint was attended to and reported on by Captain Mmethi and other members on 13 July 2020 from around 08h00 till 18h10 at the gate at the BMW Distribution Centre at the corner of Helium and Aluminium Streets, Rosslyn. Captain Mmethi received assistance after he sent a request, and three vehicles were reposted to assist. No violent incidents were reported. At 13h35, the CSS employees were still at the Distribution Centre waiting for someone to address them. Captain Mmethi reported that Mr Gerber of Bidvest, the manager and Mr Bopape, addressed the respondents at 13h58. Constable Chauke was present at 14h40 when the meeting was still in progress. When the CSS employees gathered at the main gate and blocked the main gate requesting to speak with the Director of CSS, their Labour Broker, Captain Mmethi, requested that they clear the area and successfully negotiated with the CSS employees who cleared the main gate. There were no obstructions at the gate at all. According to the SAPS, the number of attendees was around 20 people. When a meeting was agreed to with the CSS employees on 15 July 2020 at Isando, the CSS employees dispersed peacefully. The SAPS recorded that the incident was policed successfully. It was later reported that the CSS employees were all sitting peacefully outside. They intended to

hand over a memorandum to Mr van der Berg of the applicant. After the memorandum was handed over, all the CSS employees dispersed peacefully from the applicant's premises. The SAPS reported once again that the incident was successfully policed.

[14] This court is required to determine whether the *rule nisi* should be confirmed?

[15] In *Arendsnes Sweefspoor CC v Botha* 2013(5) 399 (SCA) at para [18] the Court said:

"[18] It is trite that the rules exist for the courts, and not the courts for the rules. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A – B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130, where it was pertinently observed that:

'The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice.

Of course, if one is absolutely prohibited by the Rule, one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this — see *Simmons, NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case; in essence it is a matter of fairness to both parties (see *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363G – H).'

[16] In *Hotz and Others v University of Cape Town* 2017(2) SA 485 SCA at paragraph [29] the Court related the trite requirements of an interdict as follows:

[29] The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended, and the absence of similar

protection by any other ordinary remedy.' Once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes and potentially infringe the rights of security of the person enjoyed by students, staff and other persons on the campus.

[17] The first issue raised when the matter came before this court for confirmation of the interim interdict was the issue of service. All the respondents took issue with service of the application. The manner of service on some of the twenty-nine respondents was by WhatsApp. Not all twenty-nine respondents received the application via Whatsapp. There was no service on the thirtieth to the thirty-second respondents. Service was effected on the SAPS at Akasia SAPS. The order did not make provision for service by Whatsapp. The deponent to the twenty-nine respondents' affidavit, Mr Phauwe Phosa, the General Secretary of the National Enterprises Workers Union (NEWU), did not receive the notice at all.

[18] It is evident that there was no compliance with rule 4(1)³ of the Uniform Rules of Court. The applicant was aware that it did not comply with the rules strictly and requested that the court exercise its discretion in favour of the applicant as the first to twenty-ninth respondents filed a notice of intention to defend and an answering affidavit. The applicant also referred to s 44 (1) of Superior Courts Act 10 of 2013⁴ , which provides that service '*may be transmitted by facsimile,*

³ Rule 4(1)(a)(i) by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability

44. Electronic transmission of summonses, writs and other process.—(1) (a) In any civil proceedings, any summons, writ, warrant, rule, order, notice, document or other process of a Superior Court, or any other communication which by any law, rule or agreement of parties is required or directed to be

or by means of any other electronic medium, to the person who must serve or execute such process or communication.” Whilst there was non-compliance with rule 4(1), the notice did come to the attention of most of the respondents to the extent that they were able to file a notice of intention to oppose. They also filed an answering affidavit. It can be accepted that the respondents received notice via Whatsapp in compliance with s 44 of Act 10 of 2013 to enable them to oppose the application despite there being non-compliance with rule 4(1). The court stated in paragraph [27] in *Arendsnies* ‘*it must be remembered that even where peremptory formalities are prescribed by statute, not every deviation from the literal prescription results in nullity. The question always remains whether, in spite of the defect, the object of the statutory provision has been achieved*’. It is clear from the opposition that there was a notice to the respondents.

[19] The issue of consequence is the discrepancy in the version of events described by the applicant as compared to the respondents. The applicant referred to photographs and video evidence that showed the twenty-nine respondents blocking the entrance to the property. It was also alleged that they had placed rocks and boulders in the driveway in front of the gate at the premises. The twenty-nine respondents deny this version. The thirty to thirty-second respondents’ version similarly does not support the applicant’s version that the respondents blocked the entrance and intimidated drivers. The applicant stated that the SAPS refused to assist until an interdict was obtained. The SAPS version also refutes this.

[20] Colonel Alberts stated in his affidavit that there were not more than twenty CSS employees present. The CSS employees wanted to hand over a memorandum. The SAPS cautioned them not to commit criminal acts. The police report on both dates indicated that the CSS employees were standing on the pavement

served or executed upon any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby, may be transmitted by facsimile, or by means of any other electronic medium, to the person who must serve or execute such process or communication.

(b) The document received or printed as a result of the transmission contemplated in paragraph (a) is of the same force and effect as the original thereof.

waiting to talk to a representative. The report further indicates there was effective policing without any incidents. No mention is made of rocks on the road or intimidation of drivers, as stated by the applicant.

[21] The applicant attached photos in its replying affidavit rather than in its founding affidavit. It is trite that the applicant should make out its case in its founding affidavit. The photographs depict persons standing on the road and the pavement. This accords with the respondent's versions that they moved from the gate over to the pavement. It is not evident from the photographs that the CSS employees were blocking persons from entering the applicant's premises or threatening and intimidating drivers. The applicant furthermore relies on two photographs marked with a green stripe to show that there are stones on the side of the road. The photograph is taken from an obscure angle such that it is not possible to identify the property as the applicant's premises or the gate or entrance as that of the applicants. It is also not possible to say with certainty that the rocks are placed across the driveway of the applicant's premises. If these were indeed rocks blocking the premises, the SAPS would undoubtedly have taken action on the two days they were present. The police report does not accord with the applicant's version.

[22] Colonel Alberts likewise disputed the applicant's version that the CSS employees threatened harm to the applicant or committed criminal acts. He furthermore disputed that the police failed to respond and required an order to respond. Colonel Alberts explained that police were deployed to the applicant's property despite having limited resources during the Covid pandemic. Once the SAPS were despatched, they remained at the premises and filed reports indicating how they managed the applicant's complaint. He referred to the police reports and disputed that the applicant had proved a reasonable apprehension of harm or that their rights had been infringed based on the SAPS's observation of the CSS employees conduct. His version correlated with the CSS employees that the applicant failed to prove that they suffered an injury or a reasonable apprehension of prejudice.

- [23] In order to be granted a final interdict, the applicant must prove specific requirements that are well established: a clear right, an injury committed or reasonably apprehended, and no alternative remedy. The applicant is entitled to conduct its business without the unlawful interference of any party. The presence of an injury or a reasonable apprehension of an injury is asserted by the applicant and disputed by the CSS employees and the SAPS, who were present on several occasions. The CSS employees deny that they threatened injury to the applicant or its clients. They were present to hand over a memorandum. The applicant refused to engage with them and regarded the respondents as a nuisance after their contracts had ended. The applicant refused to permit them to meet with CSS or BIL representatives on the premises or at the Vehicle Distribution Centre.
- [24] The respondents refer to the rule in *Plascon – Evans Paints Ltd v Van Riebeeck Paint (Pty) Ltd* [1984] 2 All SA 366 A, which provides: “... in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.” In applying the rule to the facts, both admitted facts of the CSS employees and the SAPS militate against the granting of the final order. In addition, the applicant has relied on photographs in its replying affidavit, which is evidence that ought to have been included in its founding affidavit. Considering the matter from a broad conspectus, the applicant has not made a case that justifies the final relief sought. I note that it had withdrawn its application for relief against the thirtieth to thirty-second respondents.
- [25] I turn to the question of costs. The applicant withdrew its request for relief against the thirtieth to thirty-second respondents. The applicant's statement that the SAPS refused to assist stands in stark contrast to the police reports that there was effective policing. The applicant was irresponsible in this regard when resources were required to address a national pandemic. How it dealt with the CSS employees is less than desirable when all they sought was to engage on the question of their loss of employment with the labour broker on

the premises. The applicant rushed to court with a case not supported by evidence, so that it had to supplement its case in the replying affidavit. There was no indication after the memorandum was handed over that there was a threat from the CSS employees. No reference is made to a threat in the memorandum either. The costs should follow the order the follows hereunder.

ORDER

[26] For the reasons above:

1. The interim order granted is dismissed.
2. The applicant to pay the costs.

A handwritten signature in blue ink, consisting of a large, stylized 'S' followed by a horizontal line and a vertical stroke, crossing the line.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Appearance for the applicant : Adv M Salukazana

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Date of hearing : 11 March 2021

Judgment Reserved On : 11 March 2021

Date of judgment : 22 July 2021