IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

Case No.: 3104/2014

Date Heard: 21 May 2015

Date Delivered: 28 May 2015

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD**

**t/a MTN** Plaintiff

and

**HUGHES, CHISHOLM AND AIREY INCORPORATED** First Defendant

**ARNOLD CHARLES IMMERMAN** Second Defendant

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**JUDGMENT**

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**EKSTEEN J:**

[1] The plaintiff seeks summary judgment against the defendants in the sum of R5 653 000 together with interest as set out later herein. The first defendant is a firm of attorneys duly incorporated in terms of the laws of the Republic of South Africa and practising at Mthatha. The second defendant is an attorney practising under the name and style of the first defendant at 14 Park Road in Mthatha. The second defendant has full managerial powers and authority over the operations of the first defendant, which includes the administration of the first defendant’s trust account.

[2] During approximately 2010 the plaintiff entered into a property transaction in terms of which it purchased certain immovable property in Mthatha for a purchase price of R10 million. The first defendant was appointed as the conveyancing attorney to effect transfer of the property into the name of the plaintiff. The plaintiff accordingly paid over to the defendant money in respect of the purchase price of the property and related expenses.

[3] The particulars of the plaintiff's claim alleges the following: The plaintiff paid an amount of R11 453 000 (herein referred to as "the deposit") into the trust account of the first defendant. This amount was paid in two instalments of R1 193 000 during July 2010 and a further amount of R10 260 000 on 6 October 2011. It was a specific instruction to the defendants that the deposit was to be invested in an interest-bearing trust account for the benefit of the plaintiff. The second defendant, on behalf of the first defendant, acknowledged receipt of the said amount and confirmed that the purchase price had been invested in an interest-bearing account for the benefit of the purchaser, it being Standard Bank, Mthatha West account number 081000782 in the name of the first defendant bearing interest at a rate of 6,6% per annum. During March 2014 plaintiff requested the first defendant to issue a guarantee based on the deposit supposedly being held in trust. The first defendant failed to do. The plaintiff then appointed new attorneys to attend the conveyancing and transfer of the property. During June 2014 plaintiff instructed the defendants that the deposit be transferred to the new firm of attorneys who had now been instructed. Defendants failed to act on the said instruction, however, so it is alleged, on 28 June 2014 the defendant paid an amount of R5 800 000 into the trust account of the newly appointed attorneys leaving the balance due of R5 653 000 together

with such interest which had accrued in the interim. Following these developments an anti-dissipatory order was duly obtained on 24 July 2014 together with certain interim relief which was made final on 18 September 2014. In terms of the order made Standard Bank of South Africa were ordered to freeze the said account. Standard Bank in due course advised that it had honoured the court order but that there were no monies held in the account to which I have referred earlier herein. The plaintiff alleges that the loss is occasioned by the fraud, alternatively, negligence of the second defendant. Plaintiff accordingly seeks judgment for the amount of R5 653 000 together with interest calculated at 6,6% on the deposit from the date of the deposit until the date of summons and further interest at the legal rate from the date of summons to the date of payment.

[4] The second defendant, in due course, filed an affidavit opposing the application for summary judgment. I shall revert to the merits of the defences raised later herein.

[5] When the matter was called before me on 21 May 2015 for argument, Mr **Nobela**, on behalf of the defendants, advised that he held instruction to move for a postponement of the matter. He handed up a substantive application from the Bar. Mr **Botma**, on behalf of the plaintiff, opposed the granting of the postponement. After hearing argument I dismissed the application for a postponement and I indicated that I would provide reasons for my ruling in this judgment.

[6] Before I turn to the content of the application for a postponement it is necessary to set out the history of the matter. The plaintiff launched the application

for summary judgment on 2 December 2014 and the matter was set down for argument on 12 February 2015. The defendants did not file opposing papers as provided for in Rule 32(3)(b) of the Uniform Rules of Court. The duty Judge on 12 February 2015, however, so I am advised from the Bar, considered that he knew the second defendant and accordingly declined to hear the application for summary judgment. The application was postponed to 19 February 2015, however, the date reflected on the order issued was erroneous. In these circumstances, when the matter came before Alkema J on 19 February 2015 he postponed the matter for hearing on 5 March 2015. On 5 March 2015, the day of the hearing, the defendants filed the opposing affidavit, out of time. In these circumstances the matter was again postponed to 12 March 2015. I am advised from the Bar that it was postponed to 12 March 2015 because Brooks AJ, who is an outsider to Mthatha was the duty Judge. Brooks AJ, however, indicated that he too knew the second defendant and he too was reluctant to hear the matter. The matter was accordingly called before Nhlangulela ADJP on 12 March 2015 and was postponed *sine die* to be set down when a judge from outside Mthatha performed duty in Mthatha. In these circumstances the matter was set down for hearing before me on 21 May 2015. The notice of set down was duly delivered on 7 May 2015, two weeks prior to the hearing.

[7] Against this background Mr **Nobela** moved for the application for a postponement.

[8] The second defendant filed an affidavit in support of the application for a postponement. He states that he had spent most of his time in the week preceding

21 May 2015 in East London where he has been attending to issues related to this matter with the South African Police Service and the Standard Bank Fraud Division. He annexes, in support of this contention, a document which he states is an affidavit which he has signed on 17 May 2015 in respect of the events. I pause to mention that two pages of a document headed: Affidavit: have been filed, the remainder of the statement is not annexed.

[9] The second defendant proceeds to explain that on 15 May 2015 counsel who had been briefed telephoned him to advise that he was unavailable on 21 May 2015 and he has been unable to brief alternative counsel to draft heads of argument on behalf of the respondent and to argue the application for summary judgment.

[10] He proceeds to state that he wishes to deliver a supplementary affidavit because, after working intensely over the previous six weeks on the relevant issues, new information has come to hand concerning other parties involved in the issues relating to the matter. He declares that he hopes to show that in the interest of justice and for the proper and effective adjudication of the summary judgment application this information is essential.

[11] Finally, the second defendant declares that he had discussions with the Fidelity Insurance Fund who have indicated that the matter should be postponed in order to allow him time to consider the new facts and to allow an opportunity to negotiate a possible settlement. No confirmatory affidavit from any official at the Fidelity Insurance Fund is annexed nor is any information divulged as to his identity.

[12] The principles which apply in an application for a postponement of proceedings was summarised by Plasket J in ***Persadh and Another v General Motors South Africa (Pty) Ltd*** 2006 (1) SA 455 (SE) at 459 where he stated:

> "First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has (*sic*) been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs."

[13] An application for a postponement of proceedings rests on the foundation that unless the postponement is granted the applicant will suffer prejudice in the case. It is accordingly incumbent upon the applicant for a postponement to state clearly in what manner the applicant will be prejudiced. A bare allegation of prejudice will not suffice, the applicant must do more and "satisfy the court that there is prejudice, at any rate a reasonable possibility thereof". (See ***Munnich v Munnich's Estate*** 1942 EDL 33 at 36; see also *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5th ed p. 751-752 and the authorities referred to therein.) The reasons for his inability to proceed must be fully explained so as to enable the court to conclude that it is not a delaying tacit and that justice demands that he should be afforded further time.

[14] As recorded earlier the second respondent contends that counsel instructed to argue the matter was not available on 15 May 2015. The deponent does not take the court into his confidence in stating when counsel was first instructed nor who he was. The unavailability of the particular counsel is, in any event, ordinarily, not a ground in itself for the granting of a postponement. (See for example ***Ex Parte Bloemfontein Municipality: In re Reichter v Bloemfontein Municipality*** 1937 (1) PH F32 (O) and ***D'Anos v Heylon Court (Pty) Ltd*** 1950 (2) SA 40 (C); and ***Pretorius v Die Drankraad en 'n Ander*** 1987 (2) SA 261 (NC) at 262I-J.)

[15] The second defendant provides a superficial explanation for his inability to instruct other counsel. He states that he had spent most of his time in the preceding week in East London with the South African Police and the Standard Bank Fraud Division attending to the issues in this matter. The second defendant does not, however, take the court into his confidence in explaining what efforts, if any, he made to obtain the services of alternative counsel in order to argue the matter. In this regard it is significant that counsel appeared at the hearing of the application but advised that he held instructions only to argue a postponement. I pause to mention that the second defendant alleges in his affidavit that the papers with which counsel were briefed have "mysteriously disappeared and not returned to (him)". In this regard it must be recorded that the papers run in total to just 53 pages. It is not a matter of great complexity so as to require an extraordinary period of preparation and the papers could easily have been copied from the court file or obtained from his opponent at short notice. The deponent, however, provides no explanation at all as to what efforts, if any, he made to retrieve the papers provided to counsel or to

obtain copies thereof. The inability to overcome the problem is simply not addressed at all.

[16] Second defendant says that he has been working intensely on the issues over the last six weeks. He states that new information has come to his attention in this time concerning other parties involved in the issues. He provides no explanation as to the nature of this information nor of its relevance. He does not take the court into his confidence as to the reasons for his failure to file, at this stage, an affidavit setting out the nature of this new information and the manner in which it could afford any defence to the claim. I have set out earlier the averments contained in the particulars of the plaintiff's claim. The plaintiff relies, for its cause of action, on the fraudulent or negligent conduct of the second defendant himself. This has not been denied and defendants have not addressed this allegation of the second defendant's fraud or negligence in the affidavits filed. It is difficult, in these circumstances, to conceive of the relevance of the conduct of other parties and it seems to me that an explanation regarding the relevance of this information is called for. The deponent states that he hopes to show that this information is essential in the interests of justice and for the proper and effective adjudication of the summary judgment application. In the absence of an explanation of the nature of the information or the relevance thereof for the defence against a claim founded on his own negligence the mere say-so of the second defendant cannot satisfy the court that there is any reasonable possibility of prejudice if the application were adjudicated without it.

[17] I have alluded earlier to the fact that the second defendant contends that this information has emerged over the last six weeks and no explanation whatsoever is

tendered for his failure to take the court into his confidence in respect of the nature of the information, save that he wishes to brief imminent counsel, possibly practising in Grahamstown or East London, to attend to the settling of a supplementary affidavit. He gives no explanation as to any attempt made to secure the services of such counsel notwithstanding that, on his own admission, he has spent much of the last week in East London.

[18] Finally, the deponent refers to his discussion with the Fidelity Insurance Fund who have indicated that time would be required to consider new facts and to allow for an opportunity to negotiate a possible settlement. Again the deponent does not take the court into his confidence in respect of the new facts which may be considered by the Fidelity Insurance Fund.

[19] In all the circumstances I am not satisfied that the reasons for the defendant's inability to proceed have been fully explained nor that the application for a postponement is not a delaying tactic. I do not consider that the application papers reveal clearly the manner in which the applicant will be prejudiced, more particularly in view of the statement that a settlement of the matter might be pursued. The bare allegation of prejudice is insufficient. In the present matter the finalisation of the matter has been considerably delayed already (compare ***Ngcobo v Union & South West African Insurance Co Ltd*** 1964 (1) SA 42 (D) at 44G-H). In these circumstances I considered that the interests of justice demand that the application proceed to finality and for the reasons set out herein I dismissed the application for a postponement.

[20] I turn to the merits. In response to the application for summary judgment the defendants raise two points *in limine*. Firstly, the defendants allege that the deponent to the plaintiff's affidavit for summary judgment has failed to establish his authority to depose to the affidavit and secondly it is argued that he has failed in his affidavit to verify the amount claimed, which, it is argued, is the crux of an application for summary judgment.

[21] I consider that the first point *in limine* is misconceived. Mr Willem Hendrik Weber attested to the affidavit for summary judgment. He states that he is a senior manager of technical infrastructure of the applicant. He proceeds to state that as a result of his position as a senior manager he is duly authorised to depose to the affidavit and to conduct the current litigation. This statement is not disputed. He refers to a written delegation of authority in support of the position which he holds and which was annexed as annexure "A". The defendants allege, correctly, that nowhere in the written delegation of authority is there any reference to the authority to depose to an affidavit. The delegation of authority is, however, annexed in support of his contention that he holds a senior position, not in support of the allegation that he is authorised to depose to the affidavit.

[22] Rule 32(2) of the Uniform Rules of Court, which sets out the requirements which are to be met in an affidavit for summary judgment provides that the plaintiff shall "deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed …". The rule, it seems

to me, simply requires an affidavit to be filed by any person who can swear positively to the facts.

[23] In application proceedings generally a deponent does not require authority to depose to an affidavit. The point was raised in ***Ganes and Another v Telkom Namibia Limited*** 2004 (3) SA 615 (SCA) ([2004] 2 All SA 609). In that matter Streicher JA disposed succinctly of this argument at 624F-H where he stated:

> "There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

[24] This position pertains too to summary judgment proceedings. See ***Firstrand Bank v Fillis and Another*** 2010 (6) SA 565 (ECP) 565G. There is accordingly no merit in this argument.

[25] I turn to consider the second point *in limine*. Weber states in his summary judgment affidavit as follows:

> "I have read the Applicant's summons, particulars of claim and application for summary judgment in this matter. I can and do swear positively to the claim set out in the summons and the particulars of claim and verify the Applicant's cause of action.
>
> I can and do swear positively to the facts herein contained and verify that the Defendant is truly and lawfully indebted to the Applicant upon the grounds as stated in the summons and particulars of claim."

[26] Weber incorporates the averments made in the particulars of claim in his affidavit and he swears positively to "the claim set out in the summons and the particulars of claim". The particulars of claim allege that the deposit was made in the amount of R11 453 000 in two instalments, as set out earlier herein during July and October 2010. They then allege the instruction to the defendants to invest the deposit in an interest-bearing account and the acknowledgement by the defendants that the amount had been so invested. They contain the allegation that R5 800 000 was repaid upon demand in 2014 and that a balance of R5 653 000 remains outstanding. Weber accordingly verifies "that the defendant is truly and lawfully indebted to the (plaintiff) upon the grounds stated in the summons and particulars of claim".

[27] In ***All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer*** 1970 (3) SA 560 (D) at 563H-564A Muller J stated:

> "It is impossible to lay down any rule of general application as to the degree of particularity required of an affidavit under Rule 32 (2). In view of the infinite variety of causes of action each case must depend on its own circumstances. In my view, it is permissible for a plaintiff in an affidavit filed in support of a summary judgment application, to incorporate by reference only the allegations

> contained in his summons. By doing so the plaintiff takes a calculated risk that his summons does not contain sufficient allegations to enable the Court hearing his application for summary judgment to hold that his claims are of the nature specified by Rule 32 (1)."

[28] I agree with the view expressed herein. This is clearly not a case where the particulars of claim leave any doubt.

[29] In ***Van den Bergh v Weiner*** 1976 (2) SA 297 (T) a Full Bench of the Transvaal Provincial Division considered the compliance with Rule 32(2) of an affidavit filed in support of a summary judgment application wherein the deponent had stated "the first defendant is truly and lawfully indebted to the plaintiff on the grounds as set out in the summons". He had neglected to make any express allegation in respect of the amount claimed. At 299G-H Cillié JP commented on this affidavit as follows:

> "The words of the Rule had not been followed meticulously, and it is said that there should have been a specific statement that the amount as such is also verified and confirmed. Because of the cryptic statement it is contended that the provisions of the Rule had not been complied with. This Court is of the opinion that the affidavit complies substantially with what is required under the Rule, namely verification of the cause of action and the amount claimed. By reference to the combined summons and the grounds set out therein, the respondent is in effect referring to and confirming the cause of action and the amount. The affidavit is not irregular and therefore the judgment is not one which can be set aside in terms of Rule 42 (1) (a) as having been sought and granted erroneously."

[30] The decision in Van den Bergh has been approved and followed in a number of subsequent cases (see ***Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*** 1979 (3) SA 391 (T) at 395; ***Joubert, Owens, Van Niekerk Ing v***

***Breytenbach*** 1986 (2) SA 357 (T) at 359; and ***Kruger v Standard Krediet Korporasie Bpk*** 1988 (1) SA 570 (T) at 573).

[31] In ***Standard Bank of South Africa Limited v Secatsa Investments (Pty) Ltd and Others*** 1999 (4) SA 229 (C) at 235 Van Heerden J had occasion to consider the approach in Van den Bergh. Van Heerden commented at 235H-236A:

> "The decision in the Van den Bergh case is, in my view, clearly good law *on the facts of that case*. As Cilliers JP pointed out at 300C-D:
>
> > 'Rule 32 gives a Court power to grant judgment without trial even though notice of the defendant's intention to defend had been properly given. This power must be exercised with great care, which is achieved, *inter alia*, by ensuring that the plaintiff brings his case within the scope of the Rule. It does not mean that effect will be given to any insubstantial technicality that may be set up by way of objection to the grant of summary judgment.'
>
> However, the facts before the Court in the present case can be distinguished from the facts in the Van den Bergh case. In the Van den Bergh case, the plaintiff claimed repayment of the amount of R3 000 paid to the first defendant in terms of an agreement of sale of fixed property.
> The amount claimed was not dependent upon proof of a third party's indebtedness to the plaintiff."

[32] These comments, to my mind, are perfectly consonant with the dictum of Muller J in the ***All Purpose Heating*** case *supra*. In the present case, as I have stated earlier, like the ***Van den Bergh*** case *supra*, the plaintiff claimed repayment of an amount paid to the defendants pursuant to an agreement of sale. In my view, by incorporating in the summary judgment affidavit a reference to the particulars of claim and verifying that the defendant is truly and lawfully indebted to the applicant

upon the grounds stated therein the deponent did indeed verify the amount claimed. It follows that in my view the second point *in limine* cannot be upheld.

[33] I turn to consider the defences raised on the merits of the plaintiff's claim. A defendant faced with a summary judgment application is required by Rule 32(3) to satisfy the court by affidavit or, in certain circumstances by oral evidence, of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action. Such affidavit (or evidence) must "disclose fully the nature and grounds of the defence and the material facts relied upon therefore".

[34] There must accordingly be sufficiently full disclosure of the material facts relied upon to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. See ***Maharaj v Barclays National Bank Limited*** 1976 (1) SA 418 (A) at 426; and ***Breitenbach v Fiat SA (Edms) Bpk*** 1976 (2) SA 226 (T) at 228. If the defence is averred in a manner which appears to be needlessly bald, vague or sketchy, that would constitute material for the court to consider in relating to the requirement of *bona fides* (see ***Breitenbach*** *supra*).

[35] The defendants' statement in opposition to the claim is by no means a model of clarity. The respondents raise three matters which may potentially be advanced as defences. First it is contended that an employee of the first defendant had defrauded the first defendant and stole a substantial amount of money from it. The second defendant states in his affidavit:

> "As from 2013 until 2014 the amount she took from my account is R734 755.00."

[36] He proceeds to state that Standard Bank together with two firms of accountants employed by the first defendant, one in Johannesburg and one locally, had confirmed to the first defendant that its books of account were in order and complied with all the necessary requirements. It is now abundantly clear, so he states, that his said employee together with Standard Bank and the accountants mentioned "represented an entirely incorrect situation to (him) of the First Defendant's financial position to their own benefit". Finally, in respect of this potential defence the second defendant states:

> "Whilst I fully appreciate the law of vicarious liability I respectively submit that I will be able to show on trial that the respondents cannot be held vicariously liable in the circumstances set out above, particularly where fraud is involved."

[37] I pause to record that in the portion of an alleged "affidavit" which is annexed to the application for a postponement and to which I alluded earlier the second respondent records that the plaintiff's money was never placed in a separate interest-bearing account at all and that it was deposited into the first defendant's current trust account. He acknowledges therein, however, that he is the sole signatory of first defendant's trust account held at Standard Bank, West Mthatha under account number 081000782. Whilst these averments occur in the application for a postponement, I shall assume for purposes hereof that, to the extent that they favour the defendants they are properly before me. It does not, to my mind, advance the defendants position at all.

[38] To my mind, the defendants have misconceived the nature of the plaintiff's claim. The plaintiff does not claim damages from the defendants in consequence of the unlawful conduct of its said employee. Plaintiff relies for its claim on the fraud or negligence of the second defendant as sole director and proprietor of the first defendant. The plaintiff claims the return of monies entrusted to the defendants to hold in trust pending the transfer of the immovable property. The defendants were required to hold the money in an interest-bearing account as is provided for in section 78(2A) of the Attorneys Act, 53 of 1979. There is no suggestion in the explanation provided by the second defendant that any employee withdrew any monies out of such an account. The deponent states merely that his employee had stolen money, from "my account". The fact that the loss may have occurred because he deposited the plaintiff's money into his current trust account contrary to his instructions cannot provide a defence. Even if I accept that it was intended to allege that the employee had withdrawn R734 755 which she misappropriated from the account holding the plaintiff's money, there is no attempt to explain how the remainder of the funds in that account came to be withdrawn, who withdrew them, when they were withdrawn or how they were applied. In these circumstances I do not think that the defendants have disclosed material facts which, if proved, would constitute a valid defence.

[39] The second defendant proceeds to allege in the circumstances that he is advised that the other parties mentioned above need to be joined in this action, and that "neither in fact or in law should the first and second respondents be held liable for the amount claimed by the applicant". The reference to other parties mentioned above, as I understand it, is reference to Standard Bank, the two firms of

accountants, and the Law Society. No factual basis at all is laid in the affidavit for this contention. The plaintiff's claim, as earlier alluded to, proceeds on the basis of the defendants own negligence. In the event that the defendant is of the view that it has suffered a loss as a result of the conduct of others it is at liberty to issue summons and to recover such loss from such parties. It cannot, however, create a *lis* between the plaintiff and such other parties.

[40] The second potential defence raised, somewhat tentatively, in the affidavit is that the second defendant alleges that it had been agreed that a fee would be paid to the first defendant in respect of the property transaction in the amount of R1 million. The fee, he states, would be paid either by the plaintiff or by the seller of the property. At best the second defendant raises a possibility that the plaintiff may become liable to pay this fee. No basis is laid for any contention that the plaintiff may in fact be liable to defendant in such an amount and if the mere possibility were proved at the trial it would raise no defence.

[41] Finally, the third defence raised on the papers is set out as follows in the second defendant's affidavit:

> "The situation of the first respondent was further severely prejudiced when, on or about September 2014 the applicant brought an application,
>
> 12.1 As a matter of urgency.
>
> 12.2 *Ex* partie (*sic*) and without any Notice whatsoever.
>
> 12.3 Maliciously to suspend the trust account of the first respondent. The preliminary order having the effect of a final order literally destroyed the first respondent. This order should never have been granted with respect and is incorrect in law."

[42] It was, of course, open to the first defendant to anticipate the return day in those proceedings and to set aside the interim order if it believed that the order was wrongly granted. It did not do so and no explanation for this failure is advanced. The second defendant does not deny that the order was subsequently made final and that it remains in force today. He does not allege any attempt to set aside the final order. Whatever the consequences might therefore have been to the first defendant they occurred in consequence of an order of the High Court which remains valid and binding to this day. There is no merit in this defence.

[43] In all the circumstances I do not think that the defendants have alleged facts, which, if proved at the trial, would constitute a defence to the claim. The possible defences advanced are so vague and sketchy as to raise serious doubt as to the *bona fides* of the defendants and I am not satisfied that the opposition is not merely a delaying tactic.

[44] In the result, there will be judgment for the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

1. Payment of the amount of R5 653 000,00.
2. Interest on the amounts deposited from time to time into the first defendant's trust account at the rate of 6,6% per annum up to the date of summons.
3. Interest on the amount aforestated at the legal rate from the date of summons to the date of payment.
4. Costs of the suit as on a scale as between attorney and client.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

Appearances:

For Plaintiff: Mr Botma instructed by J A le Roux Attorneys, Mthatha

For Defendants: Mr Nobela instructed by Messrs Hughes Chisholm & Airey, Mthatha