

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Appeal Case No.: **A 629/2001**

In the appeal between:

CORNELIS DORLAND

First Appellant

YVETTE DORLAND

Second Appellant

and

ANNA ALETTA SMITS
Respondent

JUDGMENT DELIVERED ON THE 24TH APRIL 2002

COMRIE J. :

The appellants and the respondent are neighbours. The appellants jointly own and occupy no. 53, Palmyra Road, Claremont. They live there with their young children. On part of the property, furthest from the respondent, the first appellant conducts a veterinary practice. The respondent owns no. 55, where she resides with her husband, who is an engineer. Among their visitors are their

young grandchildren. The area is a built-up residential suburb which is variously described by the respondent in the papers as “upmarket” or “middle-class”.

The two properties are divided by a boundary wall or walls, about 32 metres in length. Starting at the roadside the wall is a Columbia block wall some 20 metres long and 2,1 metres high. Thereafter, at the rear of the properties, there is a vibracrete wall some 12 metres long. It appears from the photographs to be a few centimetres shorter than the block wall. The vibracrete wall is located entirely on no. 53, the appellants’ property. The Columbia block wall was constructed at the respondent’s instance and expense in about 1980. It straddles the boundary, but most of it is located on the respondent’s side. According to her husband’s calculation, only 12.3 % of this wall is on the appellants’ side of the boundary.

The respondent’s property, no. 55, was re-modeled in the early 1980’s to a design by the noted architect, the late Prof. Roelof Uytenbogaardt. The block wall is an integral part of the design, joining the interior and exterior of the house in a special way. Thus the rooms have no curtains. The house has been featured at an exposition and in more than one magazine. At and near the common boundary are various trees, plants, creepers and part of a grapevine; they are tended by the respondent and her gardener. Gardening is one of the respondent’s pastimes. Her grandchildren, when they visit, like to climb in the trees near the wall.

At about 6 pm on 17 December 1999, an intruder gained access to the appellants’ kitchen. They suspect that he either entered or exited the property by climbing over the block wall at or near the respondent’s front gate, a suspicion which is gainsaid by the respondent. Be that as it may, the appellants, being concerned about their own and their children’s safety, immediately consulted security experts. They also spoke to the respondent at a stage when the installation of galvanised security spikes along the top of the walls was under consideration. The respondent was amenable to some sort of spikes. But the appellants were advised that spikes would not be adequate, and that they should rather install electrified fencing along all four boundaries of their property. The appellants accepted and acted on this advice.

Along the boundary walls between no’s 53 and 55, stanchions or posts were affixed by the contractors to the appellants’ side of the wall. These stanchions protrude half a metre or more above wall height and carry nine strands of electrified wire. Attached to the wires are large warning signs. Initially five strands were installed but the appellants, acting on advice, later increased the strands. Electrified wiring of varying heights has been installed on

all of the appellants' boundary walls.

The respondent objected to the electrified fencing. Correspondence between the attorneys ensued but failed to resolve the matter. The respondent thereupon instituted proceedings on notice of motion in which she sought an order that the appellants –

- “1.1. remove the electrified fence (including all wires, supporting poles and signs) erected on the Columbia block wall separating erf 55726 and erf 55725 Cape Town situate at Claremont, and;
- 1.2. remove the electrified fence (including all wires, supporting poles and signs) erected on the precast vibracrete wall separating erf 55726 and erf 55725 Cape Town situate at Claremont;
- 1.3. restore the Columbia block wall to the condition that the wall was in prior to the erection of the electrified fence;
- 1.4. restore the precast vibracrete wall to the condition that the wall was in prior to the erection of the electrified fence;
- 1.5. effect the removal of the electrified fence and the restoration of the aforesaid walls at their own cost; and
- 1.6. effect the removal of the electrified fence and the restoration of the aforesaid walls within a period of two weeks from the date of the order granted by the above Honourable Court.”

The application, which was opposed, was heard by **Ngwenya J** who on 28 February 2001 granted an order as prayed with costs. The appellants now appeal against the judgment of **Ngwenya J**, with leave granted by the Chief

Justice. The two contentions which appear to have prevailed at first instance are:

- a) that “putting the electrified fence on the common wall constitutes what **Ebden J** in *Pike v. Hamilton, Ross & Co* (1852) SC 191 at 198 referred to as having monopolised the whole of the common wall”; and
- b) that the electrified fence was dangerous (to the respondent, her gardener and visitors) or “at the very least is potentially dangerous”.

The learned Judge found, however, that the appellants had acted “in good faith with the view of (*sic*) protecting their own children and their own property”; but that they had in the process infringed the right of their neighbour, the respondent, “with whom they have common and equal responsibility and rights towards the common wall.”

Among the contentions debated in the affidavits were alleged contraventions of three regulations. The first was Electrical Machinery Regulation No. 11 promulgated in terms of the Occupational Health and Safety Act 85 of 1993. This regulation deals with electrified fencing in residential areas. According to Mr. van Tonder, whose evidence I shall summarise below, the installation under review complies fully with the requirements of the regulation. His evidence on this point is uncontroverted. No reliance was placed on the regulation by the respondent’s counsel, Mr. **Brown**, on appeal. I shall not therefore discuss it further.

The second regulation was a municipal bye-law regulating the height of boundary walls and fences. The maximum height for present purposes is 2.1 metres, which is the height of the Columbia block wall. It was contended for the respondent on the papers that the electrified fencing extended the height of the wall beyond the permissible limit. The evidence of Mr. Griffiths, who is the manager of the relevant municipal department, is to the effect that his directorate does not require plans to be passed for the installation of this kind of

security device. Planning permission was accordingly neither sought nor obtained in this instance. Again, the respondent's contention was not pursued on appeal, and I shall say no more about it.

The third alleged contravention was of a municipal building bye-law dealing broadly with nuisance. This contention was not raised in Mr. **Brown's** heads of argument, but it was resurrected by him during oral argument and in further written submissions made by him on behalf of the respondent after the hearing before this court. I shall come to this alleged contravention in due course.

There is a dispute on the papers about the safety or otherwise of the area in which the parties reside. The second appellant, citing chapter and verse, states that the "area experiences a serious crime problem". The respondent, while conceding the existence of a general crime problem from which her area is not exempt, states: "However, I deny that crime is a major problem in our area." To the extent that there is a dispute of fact in motion proceedings, it must be resolved in favour of the appellants (who were respondents *a quo*). Whatever the degree of the admitted problem, it is part of the respondent's case that the appellants over-reacted to the intrusion of 17 December 1999 and did so to the consequent prejudice of the respondent. Neighbourly consultation does not seem to have got very far, but no purpose will be served by attempting to apportion blame.

Mr. van Tonder is a specialist in the installation of electrified fences. By March 2000 he had installed such fencing at some 300 residential properties in the Western Cape. His firm installed the fencing now in dispute. He explains:

"4 The technicalities of the system installed are briefly as follows:

- 4.1 Strands of fully galvanised 1 mm braided steel cable are positioned around the perimeter of a property and held in place by hollow galvanised posts at the corners and hollow aluminium intermediate posts along the length of the installation.
- 4.2 Each corner post is 32 mm square galvanised tubing. The intermediate posts consist of 15 mm square hollow aluminium. The cable is held in place by plastic insulators.

- 4.3 The current is supplied by a small battery similar to batteries which are supplied with alarm systems. The system is not connected to the mains save that the battery is charged from the mains.
- 4.4 The current from the battery travels through an energiser which steps up the voltage but, for the sake of safety, reduces the amperage. The effect is to have a high voltage but zero amperage current flowing through the system.
- 4.5 As a further safety feature the current is not continuous but pulsates at intervals through the system.”

Mr. van Tonder points out that the model under review (the MEPS 122) has been tested by the S.A. Bureau of Standards and approved. He points out further:

- “6.1 The SABS permits an open voltage of 10 000 volts whilst the MEPS 122 operated at 7 600 volts, lower than the SABS specification permitted.
- 6.2 The SABS limits the impulse duration to 0.1 second whilst the impulse duration of the MEPS 122 is 0.2 milliseconds.
- 6.3 The impulse interval that the SABS requires is greater than or equal to 1 second and the MEPS 122 has an impulse interval of 1.2 seconds.
- 6.4 In all respects the components are well within the safety standards of the South African Bureau of Standards.”

Mr. van Tonder states:

“Signs have been placed in various positions along the length of the wires in compliance with Regulation 11(6)(b) which provides that the user shall *‘display notices conspicuously, warning people that the property is protected by an electrified fence’.*”

The deponent maintains that the respondent's concerns as to the dangers posed by the installation are unfounded. He says:

“12.2 The installation is designed to deliver a high voltage shock which is intermittently pulsed through the system and which has the effect of physically knocking back or repelling contact with the wires. As a safety feature and to ensure that the shock is non-lethal the amperage of the current is reduced to zero.

12.3 Were a system to be potentially lethal it would certainly never be permitted in terms of the safety parameters set by the South African Bureau of Standards. In the unlikely event of an individual inadvertently making contact with the installation the individual would be physically repelled by the system and in the process suffer a high voltage shock which would have no lasting or damaging effect.

12.4 The system is designed in such a way that it can readily be switched off by the user. Should there be a need to prune, pick fruit or work in particularly close proximity to the installation the system can be switched off for that purpose.”

At para. 17 of his affidavit Mr. van Tonder explains how five strands became nine:

“Initially the boundary wall was equipped with five strands of wire. At the places where access was possible by means of utilising an abutting gate or pillar as an access point the number of strands was increased, at those points only, to nine strands. Applicant’s photograph, ‘AS.23’, depicts the initial installation of five strands increasing to nine strands at the points where a person climbing upon a gate could gain access by stepping over the five strands. This installation looked untidy and tended to pull to one side by virtue of the strands not running in a straight line. For this reason it was decided to replace this installation with a standard nine strand installation. This was done.”

I turn to the highlights of the respondent’s case. A significant complaint is the negative impact of the installation on the aesthetic appeal of the respondent’s house and garden. This is illustrated by the photographic evidence. The stanchions and wires are not pretty, and the warning signage is in my opinion an eyesore. It is so that some of the wiring is or will be masked by foliage. Nonetheless I think it should be accepted that, particularly in the area of the Columbia block wall, having regard to the special architectural design and to the carefully cultivated garden, there has been a marked loss in aesthetic quality. At this personal level the respondent is the loser. Four estate agents, none of them on oath, are divided on the effect on the market value of the respondent’s property. The respondent’s two agents say that the installation advertises a security risk which will deter buyers. The appellants’ two agents, *per contra*, claim that in these times the additional security is a good selling point.

Secondly, the respondent complains of the dangers inherent in an installation which is designed to produce a repellant, albeit non-lethal shock. Her gardening activities, and the climbing ambitions of her grandchildren, in the vicinity of the boundary walls, must perforce be curtailed for fear of inadvertent

contact with the electricity, even though the installation is technically on the appellants' side of the common boundary. This is a risk run by the respondent or her gardener when they wish to trim the foliage, or prune the lemon tree, or pick grapes, near to the walls. Furthermore, they use a metal ladder. Occasionally, the walls are hosed down giving rise, I apprehend, to the prospect of a jumped electric spark. The appellants dispute that the grandchildren commonly climb near the wall, and they suggest that the frangipani tree in its upper reaches is in any event unsuited to such activities. The appellants offer, when gardening activities so require, to switch off the current on request. In the presently strained relationship, this conjures up the idea of diplomatic notes passing between neighbours. But the suggestion is not impossible of practical implementation. The appellants further suggest that the respondent should exchange her metal ladder for a wooden one. The respondent retorts that this just goes to show how the appellants are monopolising the walls: she, the respondent, must now ask for the current to be switched off, and she is expected to change her ladder.

The papers deal at some length with an umbrella with a metal tip. The fear is that when it rains, and the respondent collects her post or greets guests at the front gate, then the umbrella's metal tip may inadvertently come into contact with electrified wiring, with painful results. The appellants point out that the wiring is almost inaccessible in these circumstances; it is located 2,1 m from the ground on the other side of the block wall. Mr. van Tonder adds that the wooden or plastic handle of the umbrella provides adequate protection against a shock.

In addition to the municipal bye-law, these then represent the main thrusts of the respondent's case: aesthetics and danger.

The test on appeal

Mr. **Brown** submitted that the decision of the Court *a quo* was in substantial measure discretionary. He argued accordingly that our power to interfere on appeal was in some way curtailed. *Mahomed v. Kazi's Agencies (Pty) Ltd and Others* 1949(1) SA 1162 (N); *Ex parte Neethling and Others* 1951(4) SA 331 (A); *Tjospommie Boerdery (Pty) Ltd v. Drakensberg Botteliers (Pty) Ltd and Another* 1989(4) SA 31 (T). Compare *Media Workers Association of South Africa and Others v. Press Corporation of South Africa Ltd ('Perskor')* 1992(4) SA 791 (A) at 797 G. Mr. **Brown** readily conceded, however, that if the Court *a quo* materially misdirected itself, then it would be for this Court to exercise such elements of discretion as might be involved. Since I am satisfied

that there were material misdirections in the judgment of the court *a quo* (see *infra*), it is unnecessary to consider to what extent, if at all, our power on appeal may otherwise have been inhibited.

The misdirections

Ngwenya J held that “both walls namely the vibracrete wall and the Columbia block wall were meant by both parties to be party walls.” This finding did not rest on any assertion that the two walls in fact constituted one wall, i.e. two parts of a single wall 32 metres in length. On the contrary the parties treated them in the affidavits as two discrete walls, and it is clear on the evidence that the parties regarded them as boundary walls, not as party walls (see *infra*). The respondent in particular framed the relief sought upon the basis that two walls were in issue. Inasmuch as the vibracrete wall lay (and lies) entirely upon the appellants’ property, they were entitled, subject to questions of nuisance, to monopolise it; it was and is their wall to monopolise. It was not a case of “common and equal responsibility and rights”. To the extent that the judgment rested upon (an improper) monopoly of the vibracrete wall, the conclusion was in my opinion erroneous.

Furthermore, I respectfully disagree with the conclusion that the appellants had effectively monopolized both walls. I have summarized the substance of the respondent’s complaints. Despite her assertion of a monopoly, it is clear to me that no such state of affairs exists. There are many uses to which the respondent can put her side of the walls. At most for her it can be said that her usage has been potentially restricted for reasons of safety.

The learned Judge said: “From the evidence at my disposal the

electrified fence straddles from the middle of the party wall upwards.” That is factually incorrect. The posts and the strands of wire are affixed to the appellants’ side of the wall, and the block wall is 190 mm wide (380 mm at the pillars). I am not satisfied that this misdirection influenced the result, and I am accordingly not satisfied that it was material. But I am of the view that the misdirections set forth in the two preceding paragraphs were material.

Rights in the walls

A party or common wall is one which stands partly on one property and partly on the adjoining property. As indicated earlier, the evidence does not support the conclusion that the parties treated the walls as party walls in this sense. Indeed, the respondent initially averred, through her first attorneys, that the walls were built wholly on her property and that therefore her consent was required for the “attachments” (which consent she refused). Thereafter, through her new attorneys and in the light of the land surveyor’s report, she modified her assertion, namely to the effect that the block wall straddled the common boundary to such a small extent that it in reality belonged to her. For this and additional reasons she re-iterated this view in her founding affidavit. On the other hand there is no evidence before the Court that, prior to the events giving rise to this case, the appellants ever applied their minds to the distinction between a boundary wall and a party wall, or even that they were aware of it.

On appeal Mr. **Brown** did not seek to support the contention that the Columbia block wall belonged to his client. He correctly accepted that it was a party wall *stricto sensu*. He also accepted that both the appellants and the

respondent enjoyed rights to the usage of this wall up to the median line, notwithstanding that only 12.3% of the wall stood on the appellants' property. Van der Merwe: *Sakereg* (2 ed) at 390 – 3. A limitation on the foregoing right is that one owner, by his or her use of the wall, may not (unreasonably) prejudice his or her neighbour. *Ibid* at 392 – 3; *Law of South Africa* (ed Joubert), vol 27, para 214. Mr. **Brown** submitted that such prejudice would include more than physical damage to the wall or a threat to its structural integrity. More specifically, it would include complaints of the kind relied upon by the respondent. In my view the authorities do not bear out this contention except on the basis of nuisance. It is to this topic that I accordingly next turn.

Nuisance and aesthetics

The law does not permit an owner (or occupier) of property to use it unreasonably, that is to say to the undue detriment of his or her neighbour's enjoyment of the latter's own property. (Neighbour here is not confined to next door neighbour). Such improper usage, if continuing or likely to be repeated, may be interdicted as a nuisance; if accompanied by *culpa* and loss, it may form the basis for an action in damages. *Law of South Africa* (ed Joubert) vol 19 (first re-issue) para 214, 218. All this is trite, and many examples are to be found in the case law and in the textbooks.

Earlier in this judgment I said that the "stanchions and wires are not pretty and that the warning signage is in my opinion an eyesore." That, of course, is a personal reaction based on the photographic evidence; it is an aesthetic opinion which may or may not be shared by others. This brings to the fore the question, debated in argument, whether aesthetic considerations play any role in the law relating to neighbours and nuisance. Prof. Milton, writing in the *Law of South Africa* (ed Joubert) vol 19 (first re-issue) para 209, gives a negative answer and cites two early English cases in support. Mr. **Brown** was unable to refer us to a single decision of our Courts since the Charter of Justice holding, or favouring the view, that aesthetics are relevant at all. Nor have I found one. The *ratio* of *Vanston v. Frost* 1930 NPD c21 (heightening of fence) is not strictly in point; nor is the *ratio* of *Paolo v. Jeeva N.O. and Others* 2002(2) SA 391 (D)

(magnificent view impeded by erection of dwelling on adjacent property). It is true that this may in part be due to the strong influence of English law in this sphere for more than a century; for this reason it may have become part of our received law. The trouble with aesthetics, visual or other, is that they are notoriously subjective and personal. *De gustibus*. I should think it difficult enough to get any group of persons with similar backgrounds and qualifications to agree on what constitutes a worthwhile work of modern art. Extend this exponentially to the general population, and the ambit of diverse tastes, of likes and dislikes, becomes almost infinite. I consider this to be an area into which as a matter of judicial policy the courts should not venture. As it was put by the California Court of Appeal, third district, in *Oliver et al v. A T&T Wireless Services et al* (1999):

“Otherwise, one person’s tastes could form the basis for depriving another person of the right to use his or her property, and nuisance law would be transformed into a license to the courts to set neighborhood aesthetic standards.”

I conclude, therefore, that purely aesthetic considerations are irrelevant in the common law relating to nuisance and neighbours. To borrow again from the same Californian judgment, while I have “sympathy for the [respondent’s] plight, not all plights give rise to legal rights.”

Nuisance and danger

It may be accepted that danger, or potential danger, emanating from one property to a neighbouring property, may constitute a nuisance. But the presence or threat of danger is not a nuisance *per se*. It is a question of degree. The enquiry is whether the offending owner is acting unreasonably in all the circumstances. Reasonableness in this context is to be assessed objectively. *Regal v. African Superslate (Pty) Ltd* 1963(1) SA 102 (A); *Law of South Africa*, supra, para 189. Compare Van der Merwe: *Sakereg* (2 ed) at 190. The test is

sometimes formulated in this way: whether the offending owner's conduct exceeds what the complainant owner can reasonably, and objectively, be expected to tolerate or forebear? *Lawsa, ibid.* That seems to me to be an appropriate test to apply in the present appeal. In doing so we must weigh the gravity of harm suffered against the utility of the conduct causing the harm.

I have recorded that the parties reside in a "middle-class" or "upmarket" suburb. The first appellant is a professional man, as is the respondent's husband. It appears that the area is not free from crime. The appellants have a legitimate interest in protecting their property and family against intruders, and against a repetition of what happened on 17 December 1999. For them to have taken some measure to improve their security is an understandable reaction on their part and not in principle unreasonable. It appears from the affidavit of Mr. van Tonder that the measure chosen, electrified fencing, is becoming increasingly common. The choice of this security measure in a residential area cannot be regarded nowadays as extreme in my view, even though many owners, similarly placed, may prefer to settle for less if they can.

The respondent has a legitimate interest in pursuing her pastime of gardening. It is a normal incident of residential ownership and one which many owners hold dear. She is also entitled to enjoy the visits by her grandsons, and to allow them (responsible) free rein in the garden. I have already accepted that the presence of the electrified fencing curtails the foregoing activities to some extent in the vicinity of the boundary walls. The issue, as I see it, is whether such curtailment is more than the respondent can reasonably, and objectively, be expected to forebear in the circumstances. In this connection a point of some significance was raised by the bench during argument. It is this: that, aesthetics aside, no part of the electrified fencing intrudes upon or over the respondent's property. It is not like noise, or odour, or smoke, or gases, or falling leaves, or seeping water which come on to the complainant's property or which are deemed to do so. On the contrary the danger only arises when the respondent, or her gardener, or her grandsons intrude (actually or by extension) on or over the appellants' property, albeit inadvertently. It is perhaps not too much to ask of the respondent that she takes care to keep to her side of the common boundary, and that she takes steps to ensure that her grandsons and her gardener do the same. Added to this is the fact that the appellants have offered to switch off the current on request at appropriate gardening times. The genuineness of this offer is not disputed, although I appreciate that the respondent would rather not labour under a consequent sense of obligation to

her neighbours. Swapping the metal ladder for a wooden one would entail no great expense; it is not an unreasonable suggestion. The umbrella complaint is, I consider, a makeweight.

It seems to me to make little material difference whether the installation comprises five strands or nine. The potential danger remains much the same. The alternative of steel spikes would reduce the risk in some respects, but might conceivably be worse for the grandsons, should they fall. Had spikes been installed, I would expect the respondent, as a responsible grandparent, to have forbidden them to climb in the vicinity of the boundary walls.

Weighing everything in the balance I have reached the conclusion that the appellants' conduct represents a proper exercise of their rights of ownership of no. 53, that it does not exceed what the respondent can reasonably be asked to tolerate, and that it should not be characterised as objectively unreasonable. It follows that I do not find that the appellants have created a nuisance on the common boundary with no. 55.

The municipal bye-law

The bye-law in question was promulgated by the Cape Town City Council in Provincial Gazette no. 4672, dated 23 November 1990. Section 2(1) provides:

“2(1) No person shall in any building or on any land do any work or put any building or land to a use calculated to depreciate or disfigure property, or to interfere with the convenience or comfort of the neighbours or to become source of danger.”

It is a question of interpretation whether a statutory provision of this kind intends to confer a right of action (sometimes called a statutory right) on a private

individual such as the respondent. *Patz v. Greene & Co.* 1907 TS 427; *Callinicos v. Burman* 1963 (1) SA 489 (A) at 497 – 8; *Da Silva and Another v. Coutinho* 1971(3) SA 123 (A) at 134 ff. Compare *Faircape Property Developers (Pty) Ltd v. Premier, Western Cape* 2000(2) SA 54 at 65 – 6.

Sections 2(3) and 2(4) provide:

- “2 (3) Before any criminal or civil proceedings are instituted by the Council against any person under subsection (2) read with subsection (1), the Council shall serve upon such person a notice in writing and in such notice shall set forth with reasonable particularity the facts which in its opinion constitute such contravention or non-compliance and the things to be done (if any) within a time to be specified in such notice in order that such contravention or non-compliance shall cease.
- (4) Nothing in this section contained shall be construed as preventing any person other than the Council from instituting criminal or civil proceedings under subsection (2) read with subsection (1), as the case may be, in any case in which the Council after due request certifies that it declines to issue any notice referred to in subsection (3).”

It appears to me that sub-sections (3) and (4) furnish a clear answer: namely, that a person such as the respondent may enforce s. 2(1), criminally or civilly, provided the Council, after due request, certifies that it declines to issue the requisite notice. It was incumbent on the respondent, as the applicant in the

Court below, to make this allegation. The best evidence invoking the bye-law would have been to annexe the Council's certificate to her founding affidavit. She failed to do so. From the relatively short time which elapsed prior to the institution of these proceedings, I infer that she probably never approached the Council in this regard. Be that as it may, there is no certificate before the Court, nor an allegation that one was refused.

It follows that the respondent must fail on this leg of the case because on the papers she has acquired or derived no personal right of action from the bye-law. It is accordingly unnecessary for us to determine the meaning and scope of the bye-law itself, and I express no views on that topic.

Conclusion (and costs)

For all the foregoing reasons I conclude that the Court *a quo* erred in granting the order prayed; and that the application should have been refused with costs. The appeal must therefore succeed with costs subject to the following qualification. The record on appeal unnecessarily incorporated the petition to the Chief Justice for leave to appeal, and the affidavits opposing leave. Mr. **Webster**, for the appellants, conceded that the costs appertaining thereto should be disallowed.

Order

The order is in the following terms:

- a) The appeal succeeds with costs, including the costs of the applications to the Court *a quo* and to the Supreme Court of Appeal for leave to appeal;
- b) The costs associated with incorporating pp. 253 – 324 in the record of appeal are disallowed;
- c) The order granted by the Court *a quo* is set aside and replaced by an order that the application be dismissed with costs.

R.G. COMRIE
JUDGE

I agree.

W.J. LOUW
JUDGE

I agree.

B.J. VAN HEERDEN
JUDGE

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Appeal Case No: **A629/2001**

In the appeal between:

CORNELIS DORLAND
YVETTE DORLAND

First Appellant
Second Appellant

and

ANNA ALETTA SMITS
Respondent

Appellant's Advocate	:	Adv. A.C. Webster
Appellant's Attorney	:	Messrs.Dercksen & Company (Ref: H.R. Jordaan)

Respondent's Advocate	:	Adv. A.D. Brown
Respondent's Attorney	:	Messrs. C.K. Friedlander Shandling & Volks Inc. (Ref: J. Blignaut)
Date of Hearing	:	1 February 2002
Date of Judgment	:	24 April 2002