REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2 AUGUST 2024 ......[redacted].....

DATE SIGNATURE

Case No: 52676/2017

In the matter between:

JOHANNES HENDRIKS **Plaintiff**

and

GREGORY HOGG **Defendant**

JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is a defamation action concerning a homeowner's association. The plaintiff, a former Estate Manager at the Serengeti Golf and Wildlife Estate sued the defendant, a homeowner and member of the Serengeti Golf and Wildlife Property Owners Association ("SPOA"/homeowners' association) for defamation. The plaintiff was aggrieved by the contents of a publication sent by e-mail and later attached to a WhatsApp message. The relief sought by the plaintiff is the defendant publicly apologize and pay compensation in the amount of R200 000.

[2] It is not in dispute that the defendant, Mr Hogg acknowledges that he sent an email on 9 May 2017 to the Board of Directors of SPOA ("Board") and on 15 May 2017 sent a WhatsApp message attaching the e-mail to approximately 150 SPOA members called "Serengeti Gentlemen."

[3] The e-mail to the Board of Directors of SPOA advised that he was bringing charges against the plaintiff, Mr Hendriks. It read as follows:

> "Hi Board
>
> Trust all is well. Please be advised that I am bringing charges against Mr Hannes Hendriks for misappropriation of 'Capital Funds' of more than three million rand".

[4] The e-mail further attached minutes of a meeting held by the Dispute Resolution Committee and the remainder of the e-mail contained the following:

> "I would please ask the board to refer my previous Ethics case where it was outlined by Smiley Schoon that Mr Hendriks qualification are legitimate qualifications which will support my charges brought forward to the board. That case is still not resolved? Please advise on a date to a hearing".

[5] The WhatsApp sent message stated the following:

> "Our problem is our SPOA management. As member we need to take action like what we have done with the security. Unfortunately, it will take time but I'm confident Shanye and his team will bring us back to where we need to be. I'm past bitching so I've started the process. Please see below email."

[6] The defendant, Mr Hogg denies that the publications were defamatory and wrongful. He advances a response of truth and public benefit, alternatively protected commentary and a privileged occasion as grounds of justification that would render the publications not wrongful but lawful. He further denies *animus iniuriandi*, of having the intent to injure the reputation of the plaintiff. He pleads defences of justification in the event that the published message is defamatory.

[7] Both Mr Hendriks and Mr Hogg testified in the trial over a period of three days. The evidence elicited that money was spent on property that did not belong to the homeowners' association, SPOA. The property belonged to the developer, African Kingdom Holdings (Pty) Ltd (AKH developer) and Tridevco (Pty) Ltd.

Legal principles

[8] The *actio iniuriarum* is a common law action for delict which seeks to protect an individual's dignity and reputation. The value of human dignity is protected in section 14 of our Constitution. It seeks to protect an individual's sense of self-worth and privacy. As well as an affirmation of the worth of human beings in our society. This includes the individual reputation of each person that is built upon his or her own individual achievements. This view has been expressed in ***Khumalo & Others v Holomisa***[1] precisely as follows:

> "[27] ...The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual..."
>
> [28] The law of defamation seeks to protect the legitimate interest individuals have in their reputation to this end and therefore it is one of the aspects of our law which supports the protection of the value of human dignity."

[9] The personality rights must be impaired intentionally by an unlawful act to claim damages. In this instance the court is to determine whether the published statement defames the plaintiff, Mr Hendriks.

[10] In ***Le Roux and others v Dey***[2] the Constitutional Court in assessing whether a publication is defamatory would look at it through the prism of the Constitution and its values and held that:

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[1] 2002 (5) SA 501 at par 27 and 28.
[2] 2011 (3) SA 274 CC,

> "Defamation is aimed at compensating the victim for any publication that injures the plaintiff in his good name and reputation. Its focus is the protection of the constitutional rights to dignity and privacy of any person."[3]

[11] The court further endorsed that in considering the meaning of published words, firstly the objective test of the reasonable reader be applied. Thereafter it can be considered whether the meaning is defamatory. The test was expressed as follows:

> "Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied."[4]

[12] The ordinary meaning of words through the objective test of the reasonable reader requires an understanding of the statement in its context and the factual

[3] at para 31
[4] *Ibid*, para 89

circumstances surrounding its publication. In this respect assessing the evidence of the parties are key.

Evidence of the parties

[13] Mr Hogg testified that he was a member of SPOA since around 2014 when he purchased a stand in the Estate. He was frustrated because the developer, AKH stopped developing the Estate and was not honouring its obligations. He found it surprising how little say owners had in the management of the Estate. Especially since each owner had one vote per stand as opposed to the developer, AKH having 200 votes for each unsold stand it held. Hence the developer held by far the majority of voting rights since the Estate was not fully developed.

[14] As a homeowner he raised questions and directed them to Mr Hendriks who was considered 'the face of the Estate'. He therefore sent an e-mail to Mr Hendriks on 22 August 2016 asking about information sessions. Mr Hendriks informed him that the usual information sessions hosted for owners to pose questions to management have been stopped.

[15] Mr Hogg was concerned about a loan that SPOA advanced to the AKH developer. He raised this issue with Mr Hendriks, who replied by e-mail under the signature of the Board of Directors of SPOA on 6 February 2017 that the loan was above board as the so-called "business judgment rule applied". It was later declared by SPOA's auditors that the loan was in contravention of the Companies Act. The

auditors reported the incident as a reportable irregularity to Independent Regulatory Board for Auditors (IRBA).

[16] On 13 February 2017, Mr Hogg contacted Mr Hendriks about his wife's involvement in her business, publishing a "suppliers' guide" to homeowners of SPOA. He questioned whether it wasn't a conflict of interest. Mr Hendriks informed him that the commercial rights belonged to the AKH developer and not SPOA. Mr Hogg was referred to the social and ethics committee to address his complaints. At the hearing, the committee decided to leave the decision to be made by the Board of SPOA. Mr Hoggs testified that he heard nothing further on the issue from the Board of SPOA.

[17] Mr Hogg raised three issues relating to the concerns surrounding the publication in question. The first being costs for the bridge over the river crossing, the second to the cladding done outside the south gate and the third being R890 000.00 spent in respect of the contractor's yard. Mr Hendricks could release funds of SPOA and authorise payments.

[18] In this regard, Mr Hendriks testified that within a conservation area on the Estate was a river crossing, previously consisting of storm water pipes covered with gravel, providing a crossover. Flooding damaged it twice, and the insurance company advised that the crossing be upgraded. If they failed to so, there will be no indemnification cover if there is flood damage again. As a result, the Board of SPOA passed a resolution approving a new bridge on the site.

[19] Mr Hogg testified that he had a meeting with Mr Hendriks at the bridge site. He followed the meeting up with an e-mail on 10 February 2017 recording that he recalls a figure of R1 million being cited by Mr Hendriks and asked for confirmation of this. No response was received, despite a follow-up e-mail sent on 14 February 2017. Once again on 21 February 2017, Mr Hogg specifically asked Mr Hendriks to point out where in the financial statements the expenditure on the bridge would be reflected and pointed out that this bridge was "on the developer's land". Mr Hendriks replied by saying it is not reflected in the financial statements yet as the expenditure was in the new financial year and the land had been transferred to SPOA. Mr Hendriks wrote in the following words:

> "So the answer is; that river crossing is on land that has been transferred to the SPOA and the expenditure is not in the AF for the year ending 30 June 2016."

[20] It was testified that no Annual General Meeting (AGM) of SPOA was held in 2016. Mr Hogg asked Mr Hendriks for proof of the transfer of land, which Mr Hendriks undertook in writing to provide later, but didn't. This representation that the "land has been transferred to SPOA" led him and another member of the estate, Mr Tom Lessing, to do a Deeds search. They ascertained that the registered ownership of the land had not been transferred to SPOA as misrepresented by Mr Hendriks.

[21] They found that the property on which the river crossing is situated belongs to a company by the name of Tridevco (Pty) Ltd. Hence money was spent on building the bridge on Tridevco's land and which according to them constituted improper expenditure.

[22] Mr Hogg and other owners decided to obtain a legal opinion on the matter and other issues concerning the homeowners. EYS Attorneys provided an opinion on 2 May 2017 that the homeowners association SPOA, is only liable for capital expenditure which are approved by the Board in respect of SPOA property that has already been transferred to SPOA.

[23] In addition, the loan advanced to the developer, AKH was unlawful, and that the developer is supposed to pay levies in terms of the governance documents of SPOA. Upon consideration of the legal opinion, Mr Hogg sent the e-mail in question on 9 May 2017 to the Social and Ethics committee of SPOA, being the same route, he was advised to follow a few months prior. He requested a hearing. He only received an acknowledgement of receipt, but no hearing date.

[24] Mr Hogg forwarded further information to the same recipients, such as the legal opinion, an extract from the Articles of Associations and Mr Hendriks' e-mail claiming that "the land has been transferred". In the first e-mail sent on 15 May 2017 at 11h41, Mr Hogg wrote:

> "Hi Shayne
>
> Trust this email finds you well.
>
> Please see Point 14.7 from our AOA which is our MOI which supports my case.
>
> '14.7 The construction and maintenance of the common property stands and servitude areas shall be the responsibility of the Developer until the transfer

thereof into the name of the Association upon which responsibility will pass to the Association'.

Not even a board member has the mandate or may pass a 'Resolution' to authorise any expenditure on land that hasn't been transferred into the name of the Association".

[25] In the second email sent on 15 May 2017, at 15h19, Mr Hogg referred to SPOA funds expended on land which was not transferred to it. As well as R890 000.00 spent in respect of the contractor's yard; and R187 283.87 spent to cladding done outside the south gate.

> "Please see attached email named 'Bridge' this is where Mr Hendriks claims all the various land and infrastructure that has been handed to us. WHICH IS CLEARLY INCORRECT. Please check deeds office for clarification...The amount is around R2.5m".

[26] Mr Hogg had specifically asked for an investigation into Mr Hendriks who told to him when advising that the land on which the bridge was erected was transferred to the SPOA was in fact untrue.

[27] The Board's response was that there were two registered servitudes on the land. It was the first time that Mr Hogg heard of servitudes. One servitude was for a 'right of way' where the cladding had been done. The servitude was in favour of the developer AKH and not SEPOA. The other servitude at the river crossing was property

owned by Tridevco Pty Ltd that granted the developer AKH, use of land. SPOA thus became the nominated beneficiary of the 'right to use'.

[28] Mr Hendriks testified that SPOA funds were used for these works. These funds were authorised by the SPOA Board, that passed resolutions authorising the works and payment of the costs occasioned by it. He explained that he had no authority to approve such works. In his capacity as the estate manager, he had overseen the performance and payment of the works.

[29] The Board subsequently investigated Mr Hogg's charges against Mr Hendriks and confirmed that the charge against Mr Hendrik was unmeritorious, on the basis that the Board had approved the expenditure of funds for the works complained off. Mr Hendriks only acted upon the instructions of the board.

[30] A letter explaining the charges and the finding of the Board was sent to all homeowners, members of SPOA on 23 June 2017, six weeks after the WhatsApp message was sent by Mr Hogg. Mr Hendriks was satisfied with this letter explaining the charges and the situation that set the record straight. He did not think that anybody apart from Mr Hogg, thought any less of him or that he was involved in any inappropriate conduct.

[31] After these explanations to all the members of SPOA, Mr Hendriks instituted action on 31 July 2017 against Mr Hogg demanding R1,5 million damages without any

forewarning of a demand or seeking of an apology. It was in the third amendment to his particulars of claim, 3 years 4 months later, that Mr Hendriks sought an apology. He further reduced his demand of damages to R200 000.

[32] It is in the context of these facts that the construct of the reasonable reader will read and understand the publication. In ***Channing v South African Financial Gazette Ltd and Others***[5] the court provided a description of the ordinary reader as follows:

> "From these and other authorities it emerges that the ordinary reader is a "reasonable", "right-thinking" person, of average education and normal intelligence; he is not a man of "morbid or suspicious mind", nor is he "super-critical" or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read."

[33] In a similar vein the legal construct of the 'reasonable reader' can be described as a right-thinking person of average education and normal intelligence, not of morbid or suspicious mind, nor super-critical or abnormally sensitive. Where members are of a certain community, it could be relevant to determine how ordinary members of that community would have understood a statement.

[34] Queries and complaints are to be addressed by the Board of SPOA. It is noted that SPOA is a non- profit company, established in terms of section 21 of the

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[5] 2011 (6) BCLR 577 (CC) at para 89.

Companies Act.[6] Its affairs are managed and controlled by a Board of Directors to which a complaint against Mr Hendricks is made and an investigation and hearing is requested. The investigation was directed to the Board, as the body empowered with the authority to carry out the investigation.

[35] Such Board members are entrusted with a fiduciary duty of care and to consider the complaint that it receives with the utmost degree of care and confidentiality. The ordinary meaning of words used in the e-mail must be objectively assessed through the lens of a reasonable reader as a Board member of SPOA.

[36] The defence raises an arguable point. Every time someone announces that they suspect that someone is guilty of a wrongdoing or an offence and complained with the police or Public Protector or industry body such as the Legal Practice Council or an Ombud, community elder or school headmaster about the conduct, then few people's reputations would be intact.

[37] The publication to a private WhatsApp group will generally not have similar safeguards and protections like a homeowner's association, SPOA which is a non-profit company that exists to serve the members of the Estate. However, Mr Hogg testified that he shared with the members on the 'Serengeti Gentleman' group that he reported Mr Hendriks to the Board to raise awareness amongst them because the issues related to them too. All members that had received the e-mail and WhatsApp

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[6] 61 of 1973

message were members of the Estate and therefore of a certain community with a common interest.

[38] The background of the WhatsApp group was that it was started "somewhere around April 2017" as a communication tool for SPOA members belonging to the male gender. The aim of the group was to raise issues about the Estate. Only homeowners were admitted to the group. Before someone could be admitted to the group, they had to provide their details and stand number to be cross-referenced with the list of owners. In addition, some board members were part of the WhatsApp group. The estate's security manager, Jackie Viljoen, was also part of the group.

[39] Mr Hogg referred to messages from the WhatsApp group that highlighted the nature of conversations on that group. Issues about security, finances, the developer's stronghold on the Estate and the organisation of meetings to discuss such issues were communicated. He testified that the group was about community and transparency. It proved to be quite useful as members' complaints got addressed for the first time in a long time.

[40] In ***Smalle and Another v Southern Palace Investments 440 (Pty) Limited and Another***[7] the Supreme Court of Appeal confirmed that a plaintiff must stand or fall by the meanings he elected in the particulars of claim as follows:

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[7] [2016] ZASCA 189

"... If that meaning is not established he or she cannot then contend for another meaning which is defamatory per se."[8]

[41] The particulars of claim set out that according to Mr Hendriks the ordinary meaning of the words meant to right-thinking receivers of the e-mail that:

"Mr Hendriks stole money. That he stole this money for his own use. He stole a substantial amount of money. He stole this amount of money from his employer. That there is evidence to substantiate the allegation that Mr Hendriks stole a substantial amount of money, being R3 million, from his employer for his own use to such an extent that Defendant can bring a charge against the Plaintiff; and that the rightful owner of these monies was impoverished whilst the Plaintiff was enriched to that extent, to the detriment of the owner."

[42] In ***Smalle***, the court held that the reasonable reader is capable of discerning between guilt and investigation upon suspicion and stated as follows:

"Insofar as reference is made to an investigation by the Blue Scorpions and a call made on the MEC to investigate the contract, it is now settled law that the reasonable reader is well able to discern between being investigated for a crime and having committed a crime, (which may be per se defamatory). Investigation for criminal conduct or even suspicion of criminal conduct does not amount to guilt. It leaves open the possibility of rebuttal."[9]

[8] *Ibid* at para 29.
[9] *Ibid* at para 28

[43] These meanings of the statement reflect Mr Hendriks subjective view that he took R3 million of SPOA's money and put it in his own pocket for his own benefit. Further, that Mr Hogg implies that he is guilty of theft. But the ordinary meaning of the statements made by Mr Hogg, at best elicits a suspicion of misappropriation but not a declaration of guilt.

[44] Mr Hogg was alleging misappropriation by Mr Hendricks by reporting his suspicion of wrongdoing and seeking an investigation into misappropriation of more than R3 million of funds of SPOA that was used on property not belonging to SPOA. The articles of association of SPOA specifically stated that funds of SPOA be spend on property transferred to SPOA.

[45] The ordinary meaning of the word "misappropriate", is to appropriate money for something else than its intended purpose. In view thereof the ordinary word of the e-mail is not a statement of fact that Mr Hendriks is guilty of misappropriation of money or that he in fact stole money from his employer.

[46] The statement read in context and as a whole, does not impute guilt for criminal conduct. Although the word "charge" was used, a "charge" was not brought to the police. Mr Hogg informed the Social and Ethics Committee of the Board that he wanted an investigation and a hearing into what he perceived as the plaintiff's misappropriation of capital funds. He then informed the homeowners in the Estate on the WhatsApp Group of his complainant.

[47] In a community ascribing to fairness, transparency and accountability, that has an established mechanism, such as the Board, to address disputes and complaints arising from that community, is how a reasonable reader, as a Board Member and homeowner would have read and interpreted the e-mail. I do not find that the words "charges," "expropriation", used in the e-mail to be read by the reasonable Board Member and homeowner of average intelligence would be alarmed. And that such words are objectively defamatory of Mr Hendricks and that it is more probable that the statement will cause harm to him.

[48] Mr Hendriks conceded, the standoff between the members of the Estate and the developer AKH was common knowledge. So was the spending on the infrastructure and the controversial nature thereof. The WhatsApp message also does not convey the meaning contended for in the particulars of claim. Mr Hogg was reporting to the WhatsApp group of his complaint and the steps he took to address his concerns that affected all homeowners.

[49] The Board in its correspondence noted that it seemed that Mr Hoggs insistence to lay a charge against Mr Hendriks may have been "driven by ulterior motives" and the Board advises the member against such ulterior motives. What the ulterior motives are have not been explained by the Board.

[50] Counsel for Mr Hendriks argued that the Mr Hogg omitted to include the particulars of his purported charges in his first e-mail, was of importance. Since such inclusion that appeared in the 2nd and 3rd e-mails would have conveyed a different message compared to the blunt statement that Mr Hendriks misappropriated more than R3 million. In particular, that these explanatory e-mails were not attached to the first e-mail to which Mr Hogg tendered an apology for this omission.

[51] For this reason she argued that the exclusion of the particulars indicated an intent on Mr Hogg's side to have implicated Mr Hendrik personally, justifying a finding that Mr Hogg had the necessary intent to defame. Furthermore, that the undersupply of information merely served to raise suspicion in respect of Mr Hendriks.

[52] In ***Times Media Ltd and Others v Niselow and Another***[10], the Supreme Court of Appeal held that an assertion of mere suspicion without anything more cannot carry a defamatory meaning. The court expressed its view at para 18 as follows:

> "So far the article would raise a mere suspicion in the mind of the reasonable reader because it would be saying no more than that the beef stew served by the respondents is the component of the meal that might have been responsible for the poisoning of the children. An imputation of mere suspicion, without more, is not capable of carrying a defamatory meaning."

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[10] [2005] 1 ALL SA 567 (SCA)

[53] It was Mr Hendriks who justified the expenditure to Mr Hogg by making the misrepresentation that it was not on the developer's land, i.e. the "land has been transferred to SPOA." In cross-examining Mr Hogg, counsel for Mr Hendriks subtly stated that Mr Hendriks' statement on the transfer of land was "a bad choice of words". What in retrospect was meant a transfer of servitude rights and not a transfer of ownership rights of the land. Mr Hendriks provided incorrect information that had a consequence. This was the very issue that caused the misrepresentation and set in motion the "charge" or complaint and investigation of Mr Hendriks.

[54] Mr Hendriks undertook to provide proof of his (incorrect/false) statement about the transfer of the land. He did not. Mr Hogg testified that Mr Hendriks presented himself to be a board member and he was under the sincere belief that Mr Hendriks was such a central figure. Mr Hendriks was in a severely compromised position of interest with the developer. He was serving at the behest of the developer who had the sole right to appoint him, he was receiving a handsome remuneration, free accommodation, his wife received commercial opportunities with the developer and Mr Hendriks personally defended a loan to the developer which was later found to have been a contravention of the Companies Act.

[55] In cross examination it was pointed out to Mr Hendriks that his job in terms of the Articles of Association was "to promote, advance and protect the communal interests of the owners and occupiers of the properties of SPOA". He responded by saying that the developer, AKH was a member of SPOA as well. It was pointed out that his attitude of independence was compromised because it was perceived that he was acting in the best interests of the developer rather than the members as a whole.

[56] It was also canvassed that the email was sent on 9 May 2017 to the Board and Mr Hendricks complained that while playing golf on Saturday morning, 13 May, he was asked about the stolen money. However, it was only on 15 May that Mr Hogg sent the WhatsApp message to the homeowners. So divulging the contents of the email could have only been made by board members, who included the developer AKH and had the duty to maintain trust and confidentiality.

[57] From the evidence Mr Hogg created suspicion about Mr Hendriks. The evidence indicates an objective and reasonable grounds for such suspicion. With regards to the community benefit, homeowners of the Estate, Mr Hendriks conceded during cross examination that that the issues at play directly affected all members of SPOA. It was their money at play. SPOA is a non-profit company that exists to serve the members of the Estate. He conceded that any improper spending would affect the entire community of the Estate.

[58] It is further in this context that the WhatsApp group of Estate homeowners were informed of the investigation against Mr Hendriks. There was no intention to defame Mr Hendriks but to get resolutions on problems facing SPOA. Mr Hendriks testified that Mr Hogg should have addressed his concerns directly with the Board, he should have charged the Board for misappropriation and not him.

[59] Mr Hendriks was satisfied with the letter from the Board to all homeowners and members of SPOA, explaining the charges and the situation that set the record straight. He did not think that anybody apart from Mr Hogg, thought any less of him or that he was involved in any inappropriate conduct. This is clear proof that Mr Hendriks suffered no harm.

[60] I would therefore hold that the statements are not defamatory or injurious to Mr Hendriks' dignity. Wrongfulness has not been established in relation to the claims. It is accordingly unnecessary for me to consider the quantum of damages, the apology or the arguments relating to the balance of the pleaded defences.

[61] In exercising a discretion on costs I see no reason why costs should not follow the result, taking into account that the matter was defended in the High Court. The defendant claimed costs on Scale B when successful and should be entitled to it under these circumstances.

Court Order

[62] For these reasons the following order is made:

(a) The plaintiff's claim is dismissed with costs to be paid to the Defendant on scale B.

[redacted]

R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

COUNSEL FOR THE APPELLANT	:	ADV. CA KRIEL
INSTRUCTED BY	:	MACHOBANE KRIEL INC.
COUNSEL FOR THE RESPONDENT	:	ADV. H SCHOLTZ
INSTRUCTED BY	:	JJR BOTHA ATTORNEYS
HEARD ON	:	05 - 07 JUNE 2024
HEADS OF ARGUMENT	:	12 July 2024
JUDGMENT DELIVERED ON	:	02 August 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **02 August 2024**.