IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

20/9/2024

DATE SIGNATURE

CASE NO: 037648/23

In the matter between:-

KEITH E ENGEL N.O.	First Applicant
CARETHA LAUBSCHER N.O.	Second Applicant
KAREN VAN WYK N.O.	Third Applicant
CHRISTIAN JACOBUS VAN DYK N.O.	Fourth Applicant

VS

THE TAX FACULTY NPC	First Respondent
ERTINUS SEBASTIAAN KLUE	Second Respondent

ANNET OGUTTU	Third Respondent
CRAIG DEAN HIRST	Fourth Respondent
RODNEY PASCOE SMITH	Fifth Respondent
NEILL BASILL WRIGHT	Sixth Respondent
LERATO LORAINE LEGADIMA	Seventh Respondent
SIMPHIWE MILE	Eighth Respondent
THE ALUMNI MEMBERS OF THE FIRST RESPONDENT (BEING THE INDIVIDUALS WHOSE EMAIL ADDRESSES APPEAR ON THE SCHEDULE MARKED X AND ATTACHED TO THE NOTICE OF MOTION)	Ninth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION - CIPC	Tenth Respondent

Heard on: 30 August 2024

Delivered: 20 September 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 20 September 2024.

Summary:

1. Applications for security for costs in terms of Rule 47 must be brought promptly so that the other party is entitled to know its position in relation to security from the outset before it embarks in the ensued litigation.

2. The principle in ***Boost Sports Africa v South African Breweries Ltd 2015 (5) SA 38 SCA***, paragraph 16, is cited with approval

herein. Ultimately the court must be satisfied that the main action is vexatious, reckless or amounts to an abuse.

3. The factors raised herein, namely the inability of the Trust to pay the costs of the litigation, the delay in instituting the Rule 47 application, as well as the nature of the matter in the main application were considered against the standards of fairness and equity.

ORDER

It is ordered that:-

1. The applicants are ordered to furnish security to the respondents.
2. The form, amount and manner of the security is to be determined by the Registrar of the High Court.
3. The main application be stayed pending the furnishing of security.
4. The applicants are to pay the costs of this application which includes the costs of senior counsel on scale C.

JUDGMENT

KOOVERJIE J

SECURITY FOR COSTS APPLICATION

[1] This interlocutory application has been instituted in terms of Rule 47(3) whereby the respondents (the Tax Faculty NPC) seek an order compelling the applicants to provide security for costs.

[2] For the purposes of these proceedings, the parties will be referred to as they are in the main application. The applicants would also be referred to as "the Trust". The Trust is represented by the applicants. The respondents with the exclusion of the tenth respondent, would be referred to as "the Faculty".

[3] The Trust contests this application on the basis that the Faculty had instituted this application to merely delay the finalisation of the main application. It therefore seeks the dismissal of this application with a punitive costs order in its favour. The main thrust of the Trust's case is that the Faculty had not complied with Rule 47(1) which requires that the application should had been brought promptly and without delay.

[4] On the other hand, the Faculty's main contentions were, firstly, that the Trust would not be able to satisfy any costs order which it may obtain in its favour, and secondly, the main application has no merit, it is an abuse of the process of court, and is vexatious.

ISSUE FOR DETERMINATION

[5] The main issue for determination in this matter is whether or not the Faculty has made out a case in terms of Rule 47(3).

RELIEF SOUGHT IN THE MAIN APPLICATION

[6] The Trust submitted that by virtue of the 2019 MOI, the Trust, as the founding member, had retained 100% of the voting rights in the Faculty. Consequently the Trust was empowered to remove a director from the Faculty by virtue of a written resolution.

[7] The Trust was established as the Tax Faculty Trust in 2016. It was agreed that the shares in the Tax Faculty should be held by the Trust. The Trust was then registered as the Faculty Trust on 14 September 2018. 100% of the issued shares in the Tax Faculty were transferred to the Trust and this was reflected in the share certificate. The Trust was the holder of the issued shares of the Tax Faculty and served as the guardian to protect significant investments made to the Tax Faculty.

[8] In the main application, the Trust sought relief to the effect that:

8.1 Prayer "a" the MOI of January 2022 be declared null and void;

8.2 Prayer "b" the MOI of 2019 (Annexure "A") is binding and valid in terms of the Companies Act;

8.3 Prayer "c" the board of directors of the Faculty comprises of individuals whose particulars appear on the list attached to the notice of motion as Annexure "B".

[9] In the main application, the Trust held the view that the directors of the Faculty were incompetent in running the affairs of the Faculty. The Trust thus sought to remove them. Accordingly, the Trust invited these directors to provide reasons why they should not be removed. It is not in dispute that the main application was instituted after the Trust became aware that the 2019 MOI was amended and that the Faculty was conducting its affairs in terms of the 2022 MOI. Although the dispute in the main application concerns the legal status and the validity of the 2019 MOI of the Tax Faculty, the Trust's objective in these proceedings was to remove the directors of the Faculty.

[10] The core argument of the Trust, in the main application, is that it was lawfully entitled to remove the directors by virtue of Article 5, clause 3.5 of the 2019 MOI, where provision was made for a director to be removed by virtue of a written resolution of the Trust (the founding member).

[11] The Trust illustrates, by way of various communique, that it never consented to the amendment of the 2019 MOI. Consequently it retains the right to remove the former directors and appoint new directors. It is necessary to emphasize that in 2019, the Faculty was converted to a non-profit company (NPC) and thereafter registered as a public benefit organisation (PBO).

[12] It is common cause that there were discussions regarding the amendment of the 2019 MOI, particularly between Mr Engel (representing the Trust) and Dr Klue (representing the Faculty). The amendments were necessary as the status of the

Faculty was altered between 2019 to 2022. It was thus imperative to amend the 2019 MOI to cater for the said conversion.

[13] The Trust vehemently persisted in its papers that it had neither abandoned nor consented to the removal of its rights and privileges as the founding member of the Trust. It is common cause that the Trust is the Tax Faculty's sole shareholder and this was adopted by way of special resolution on 15 August 2019.

[14] It was contended that the amendments to the 2019 MOI were approved without the participation of the Trust. Mr Engel alleged that he was not aware that the amendments were duly approved at the AGM held on 13 January 2022, and to which meeting he was not invited. It is on this basis that he challenges the amended MOI of 2022.

ANALYSIS

[15] It is settled law that the Trust, being an incola, is only required to provide security for costs if the main application is vexatious, reckless or otherwise amounts to an abuse. In the seminal judgment of ***Boost Sports Africa***[1], the court settled this principle and at paragraph 16 it expressed:

"Absent Section 13, there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person. And as our superior courts have residual discretion in the manner such as this arising from the inherent

[1] Boost Sports Africa (Pty) Ltd vs South African Breweries Ltd 2015 (5) SA 38 (SCA) at paragraph 16

power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly even though there may be poor prospects of recovering costs, a court, in its discretion, should only order the furnishing of security for such costs by the incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse."[2]

[16] In ***African Farms Townships Ltd v Cape Town Municipality***[3] the court expressed:

"An action was vexatious and an abuse of the process of court, inter alia, it is obviously unsustainable. This must appear as a certainty and not merely on a preponderance of probability."

[17] The main contentions raised in this application and which requires a determination upon are:

(i) whether the application was brought as envisaged in Rule 47(1), in other words, was it instituted promptly;

(ii) would the Trust be able to pay the litigation costs if such an order is granted against it; and

(iii) is the main application of a nature that is vexatious, reckless or constitutes an abuse of the process of court.

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[2] my underlining
[3] 1963 (2) SA 555A at 565D-E

RULE 47(1) REQUIREMENT

[18] Rule 47(1) reads:

"A party is entitled and desiring to demand security for costs from another shall, as soon as practicable, after the commencements of proceedings, deliver a notice setting forth the grounds upon which the security is claimed and the amount demanded."

[19] I find the chronology of assistance, particularly in determining whether the delay in instituting the Rule 47 application was extensive. It was pointed that the Rule 47(1) notice was only delivered on 10 November 2023 whilst the main application was instituted months before, that is in April 2023.

[20] The timeline illustrates the following:

20.1 in April 2023 the Trust instituted the main application and on 16 May 2023 the Faculty opposed the said application;

20.2 on 30 May 2023 the Faculty filed the Rule 35(14) notice requesting documents, claiming that they were necessary for the preparation of its answering affidavit;

20.3 on 19 June 2023 the Faculty launched an application in terms of Rule 35(13) as the Trust failed to respond thereto;

20.4 on 5 September 2023 the Trust filed is notice of opposition in the discovery application (three months later);

20.5 on 14 September 2023 the Trust filed its answering papers in respect of the Rule 35(14) application;

20.6 on 6 October 2023 the Faculty filed its answering affidavit in the main application as well as its conditional counter-application;

20.7 the Trust failed to file its answering affidavit in the counter-application and its replying affidavit in the main application in terms of the agreed timelines- 20 October 2023 and 27 October 2023 respectively;

20.8 on 10 November 2023 the Faculty issued the Rule 47(1) notice;

20.9 on 27 November 2023 the Trust advised that it would not furnish security for costs;

20.10 on 18 December 2023 the Faculty informed the Trust that it would proceed to issue the application in the new year;

20.11 on 9 February 2024 the Trust filed its answering affidavit in the counter-application and replying affidavit in the main application;

20.12 on 14 February 2024 the Faculty instituted this Rule 47(1) application;

20.13 on 6 March 2024 the Trust filed its notice to oppose the application.

[21] Notably from the chronology it is evident that between May to September 2023 the parties were seized with the discovery application in terms of Rule 35. Shortly after receipt of the answering affidavit in the discovery application on 14 September 2023, the Faculty filed its answering affidavit in the main application on 6 October 2023. It thereafter filed the Rule 47(1) notice a month later, on 10 November 2023.

[22] The Trust's main contentions were that: the Rule 47 notice was not delivered promptly as the main application has already been instituted months before, that was in April 2023; the Rule 35(14) processes were merely instituted in order to delay the matter; the Rule 47(1) notice was only issued after the replying affidavit to the main application and the answering affidavit to the counter-claim had been filed by the Trust.

[23] On a conspectus of the timeline, as well as the contentions raised by the parties, it was evident that there was no intention to expedite the hearing of the main application. Neither party objected to the delays. Both parties simply went along filing their respective papers and at their convenience. The prescriptive time periods set out in the rules were not adhered to, and understandably so as this matter was referred to case management which allowed the parties to manage their time periods.

[24] However in respect of this Rule 47 application, it is evident that the parties communicated on a monthly basis, namely on 10 November 2023, the Faculty issued its Rule 47(1) notice. The Trust informed the Faculty 17 days later that it refused to furnish security. On 18 December 2023, when the Faculty informed the Trust that it would proceed with its security for costs application in the new year, no objection was raised pertaining to the delay.

[25] In this application, I have further noted that the Faculty, in prayer 3 of its notice of motion, sought relief in the following terms:

"That the main application be stayed pending the final adjudication of this application and the furnishing of security as set out above."

I have however noted that the parties nevertheless proceeded with filing their respective papers in the main application.

[26] The rationale for ensuring that such applications are issued with some expediency was dealt with by our courts. I find it apt to refer to the decision of the Supreme Court of Appeal in the ***Honig*** matter[4] cited with approval various authorities and at paragraph [14] stated:

"The question of whether security for costs should be ordered is one which ought to be raised and determined promptly, in that the very nature of such an order is that it may result in the company being prevented from litigating its claim. And if, as sought by the applicant in this case, a connected claim against it is also to be stayed, in that the company may have stayed the determination of their claim against it to its possible disadvantage. The right to seek security for costs and to stay proceedings, with a possible result that a claim for damages is frustrated, is a powerful weapon. Therefore, the litigant, who seeks to use it against its opponent is at risk of not having it available, unless the application is made persevered with in circumstances involving the least oppression of his opponent.

The primary reason why application should be brought promptly and pressed to determination promptly is that the company, by which assumption has financial problem, is entitled to know its position in relation to the security at the outset, and

[4] Exploitatie- en Beleggings Maatschappij Argonauten 11 BV & Another vs Honig 2012 (1) SA 247 (SCA) 9

before it embarks to any real extent on its litigation, and certainly before it is allowed to or commit substantial sums of money towards litigating its claim."[5]

[27] No doubt the Faculty became aware of the Trust's financial position after the Trust filed its answering affidavit to the Rule 35(14) application in September 2023. This caused the Faculty to file the Rule 47(1) notice in November 2023. The Trust was further advised that the Rule 47(3) application would follow in the new year. Although one would have expected the application in January 2024, it was nevertheless filed in February 2024. As alluded to above, no objection was raised regarding the lateness of this application at this stage.

[28] The term "as soon as practicable" as envisaged in Rule 47(1), was considered by our authorities. It has been suggested that there is nothing in the present Rule which suggest that the delay in demanding of applying for security is to be regarded as fatal.[6] A delay in itself will rarely be an overriding and decisive consideration.[7] Hence the 'delay' factor has to be weighed together with the other relevant factors dealt with below.

COURT'S DISCRETION

[29] It is common cause that the Trust does not have the necessary funds to satisfy any adverse costs that may be granted against it. The Trust, in its papers,

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[5] my emphasis
[6] Honig supra p. 253 A-B
[7] Fusion Properties 233 CCV v Stellenbosch Municipality (SCA) case no 932/2019 dated January 2021 at paragraph 24

conceded this fact. It is settled law that the inability of a party (who is an incola) to satisfy a potential costs order against him is insufficient in itself to justify an order that he furnish security. Something more is required, namely that the court has to be satisfied that the main action is vexatious or reckless or amounts to an abuse of the process of court.

[30] ***Kreetiv***[8] provided guidance on how a court should exercise its discretion when considering these types of applications. I summarize the salient principles therefrom, namely:

30.1 the discretion should be exercised in a manner where the court is entitled to consider the nature of the particular case without enquiring fully into the merits of the matter;

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[8] Kreetiv Communication CC v Harrington N.O. and Others 2024 ZAGPPHC [89] at paragraph 16 and 17
At paragraph [16] and [17] the court stated:

"[16] In coming to a decision as to how it should exercise its discretion to order or refuse security for costs the court may take into consideration the nature of the claim and the defence but the merits of the dispute are most invariably irrelevant in deciding whether the plaintiff or applicant company should be ordered to furnish security for the costs of the proceedings. In addition to the particular circumstances of the case, the court considering whether or not security should be ordered, should also have regard to the considerations of equity and fairness to both parties. It may, in the exercise of its discretion, enquire into the conduct of a party which has reduced the other party to penury.

[17] Where it is clear that if the action fails the company will be unable to pay its debts, there is a duty on the court to exercise its discretion in favour of the applicant and to order security to be given. The court is not, however, bound to order security in every case where it explain that if the action fails the company will be unable to pay the defendant's costs: the court is entitled to consider the nature of the particular case, although not enquire fully into the merits and form an opinion of the plaintiff's prospects of success. The court will take into consideration the financial position of the company at the time of the application for security, what the position is likely to be if the company loses the action and the nature of the claim. It is entitled to take into account the kind of action brought against the person claiming security in order to decide whether it is right in all the circumstances to order the company to furnish security."

30.2 the court has to consider the financial position of the entity at the time that the application for security is instituted and what the position would be if the entity loses the action;

30.3 it is required to consider the nature of the matter brought against a person giving security;

30.4 these said factors should be weighed in accordance with the principles of equity and fairness in respect of both parties.

[31] Notably the factors which a court may consider when exercising its discretion, are case specific. There is no prescribed list. The factors may include but are not limited to whether the plaintiff's claim is made in good faith or whether the plaintiff has reasonable prospects of success and whether the application for security was used to stifle a genuine claim.[9]

[32] Essentially the balance of equity and fairness boils down to weighing the injustice of the defendant if no security is ordered and in the event that the plaintiff's claim fails, the defendant would find itself unable to recover the costs that had been incurred in defence of such claim. This must be weighed against the injustice that the plaintiff may suffer if prevented from pursuing its proper claim. [10]

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[9] Barker v Bishops Diocesan College 2019 (4) SA 1 WCC
[10] Shepstone and Wiley v Geyser 1998 ZASCA 48

[33] I am mindful that the standard exercised by this court differs from that which is to be exercised when hearing the main application. In ***Fitchet v Fitchet***[11] the court stated:

"The test is applied in a different manner as to that in an application for a dismissal of the action. In an application for security for costs the test should be somewhat less stringent and other factors which are irrelevant in a dismissal application should be taken into account. Hence the detailed investigation in terms of the merits is not necessary, nor is it contemplated that there should be a close investigation of the fact in issue in the action."

[34] In ***Zietsman***[12] the court stated:

"I am not suggesting that the court should, in an application for security attempt to resolve the dispute between the parties. Such a requirement could frustrate the purpose for which security is sought. The extent to which is practicable to make an assessment of the parties' prospects of success would depend on the nature and the dispute of the case."

[35] The Faculty argued that the main application is not only reckless but the application is unsustainable. Emphasis was placed on the fact that the Trust has no real assets, no bank account, and moreso it was evident from the financial statements from the period 2020 and 2021 that the Trust was dormant and was not operating since 2019. Despite the Trust instituting this application in April

[11] 1987 (1) SA 450 at 45 E-G

[12] Zietsman v Electronic Media Network Ltd and Others 2008 (4) SA 1 (SCA) at paragraph 21

2023, it was not serious in finalizing the matter. The Trust has made serious claims against the Faculty and against the conduct of the directors without adducing substantial evidence to support its accusations. There is no merit in these allegations.

[36] The terms "vexatious" as well as "an abuse of the process of court" was defined. In ***Fisheries Development Corporation***[13] the court stated:

"In its legal sense "vexatious" means frivolous, improper, instituted without sufficient grounds to serve solely as an annoyance to the defendant … Vexatious proceedings would also with no doubt include proceedings which although properly instituted, continue with the sole purpose of causing annoyance to the defendant; "abuse" connotes misuse, and improper use, use mala fide, a use for an ulterior motive."

[37] Upon having considered all the relevant factors, namely: the nature of the claim, the financial position of the Trust, the stage at which the application for security was brought, and weighing both parties' versions against the principles of equity and fairness, I am of the view, that the Trust should furnish security.

[38] Being specifically mindful of the rights of a litigant in terms of Section 34 of the Constitution[14], I have considered the potential injustice to the Trust if it is

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[13] Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) at 1339 E-F

[14] Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial Tribunal or forum."

prevented from pursuing its claim due to a demand to pay security for costs against the potential injustice to the Faculty which may be successful if it defends a claim and will then not be able to recover its costs.

[39] Going forward, the order directing the Trust to pay security should not deter it if it intends to persist with the main application. It was vehemently argued that the fact that Mr Engel, being the sole trustee, was not involved in the amendment and the eventual approval of the 2022 MOI. The Trust persists with its status as recorded in the 2019 MOI (Annexure "A").

[40] Mr Engel does not dispute the fact that the parties agreed in principle to convert the Tax Faculty from a private full profit company to a non-profit company. However the membership of the non-profit company was not agreed and was subject to further discussions between Mr Engel and Dr Klue.

[41] It was argued that the dispute regarding the validity of the 2022 MOI remains an issue and is deserving of being ventilated. The Trust remains confident that it would be successful in respect of the relief, namely to declare the 2022 MOI invalid and to declare the initial 2019 MOI valid. The Trust, as the founding member, was lawfully entitled to participate in the amendment of the 2022 MOI.

[42] It further emphasized that the MOI was unlawfully amended. It was pointed out that a company's MOI may be amended either by approaching the court in terms of Section 36 or in terms of a special resolution through voting rights which are

exercised by the shareholders. The Trust further pointed out that as the sole voting member, it has the power to amend the MOI. The amendment should therefore only be effected in a legally permissible manner.

[43] The Faculty illustrated that the Trust's case remains unsustainable. The main argument premised by the Faculty was that even if one has regard to the 2019 MOI (Annexure "A"), the Trust's understanding of the provisions therein are misconceived. The Trust relies on Article 5- "directors and officers", clause 3.5 which reads:

"3.5 A director is removed through a written resolution of the founding member."

[44] It pointed out that the Trust failed to however address clause 4.2 which stipulated that in the event that the company becomes an approved public benefit organisation, the landscape changes. Clause 4.2 reads:

"4.2 The powers of a company will, in the event of it becoming an approved public benefit organisation pursuant to Section 30 of the Income Tax Act of 1962 be subject to the following conditions. In terms thereof the company will:

4.2.1 <u>ensure that no single person directly or indirectly control the decision-making powers relating to the company</u>[15];

4.2.2 be required to have at least three (3) persons who are not connected persons in relation to each other, to be the directors of the company."

[15] my emphasis

[45] The said provisions in the MOI are aligned with Section 30 of the Income Tax Act that also makes provision that "no single person directly or indirectly be involved in the decision making powers relating to the organisation". It was common cause that the Faculty was registered as a public benefit organisation (PBO) on 13 March 2020. The Trust could by no means have remained the sole voting member after the conversion to a non-profit company. The Trust, as a juristic person, is defined to be a person in terms of Section 1 of the Companies Act. The Trust does therefore not have the sole right to remove a director.

[46] During argument, the Trust was unable to proffer a sustainable argument concerning its independent power in the PBO. It therefore suggested that it may revisit Prayer "c" and may even abandon this relief. Prayer "c" dealt with the appointment of the directors:

> *"(c) The board of directors of the Tax Faculty comprises of the individuals whose particulars appear on the list attached as Annexure "B" to the Notice of Motion."*

[47] As alluded to above, the objective of the main application was premised on the removal of the directors due to allegations of incompetence. The Trust's version that it may only do so by virtue of the 2019 MOI, in my view, is misplaced.

[48] It is apparent that the main application was initiated after the email, sent by the Executive Trustee of the Trust, to Dr Klue on 27 January 2023, wherein it

demanded that Dr Klue be removed as a director of the company and invited him to make representations. In such correspondence the Trust expressed its disapproval of the directors' conduct, namely that they simply ignored the Trust's position. The grievances of the Trust were listed therein which included the fact that the Trust was not invited to the AGM, and the director's report or financial statements were not furnished to the Trust. Hence it cannot be gainsaid that the rationale behind seeking the court to declare the 2019 MOI valid, was to allow the Trust to gain the independent right to remove the directors.

[49] In exercising my discretion in these proceedings, on my reading of the 2019 MOI (Annexure "A"), I find that the Trust's case is unassailable as the Faculty is a PBO and the decision-making powers are statutorily ordained, not only in the Companies Act, but in terms of the Income Tax Act as well.[16] I am therefore of the view that the prospects of success in the main application are bleak. Consequently, under these circumstances, the Trust is ordered to pay security for costs in terms of Rule 47.

THE AMOUNT OF SECURITY

[50] The Registrar is equipped with the power to make a determination on the form, amount and manner of the security. I am therefore inclined to defer this task to the Registrar so that an appropriate amount in respect of the security is fixed.

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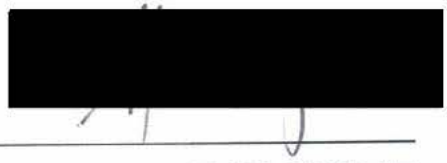
[16] Section 30 of the Income Tax Act
Section 13 of the Companies Act

COSTS

[51] The applicants are ordered to pay the costs of the application; including costs of senior counsel on Scale C.



H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicants:	*Adv. BC Stoop SC*
	Adv. NC Hartman
Instructed by:	*SC Vercueil Attorneys*
Counsel for the first to seventh respondents:	*Adv. JH Loots SC*
Instructed by:	*Scheibert & Associates Incorporated*
Attorneys for the ninth respondent:	*Lucas Deysel Crouse Incorporated*
Date heard:	*30 August 2024*
Date of Judgment:	*20 September 2024*