IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **61861/2017**

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

[redacted]

14 NOVEMBER 2024

SIGNATURE **DATE**

In the matter between:

JOHANNES JOSEPHUS PIETERSE	First Plaintiff
MICHAEL FREDERICK PIETERSE	Second Plaintiff
ELIZABETH MAGDALENA PIETERSE	Third Plaintiff

and

ORGANIC SYNTHESIS (PTY) LTD	First Defendant
STEEL KING CENTRE (PTY) LTD	Second Defendant

and

JOHANNES JOSEPHUS PIETERSE	First Third Party
BRITS WOONWAENS CC	Second Third Party

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI, J

Introduction

[1] At the request of the parties, and as directed by Ledwaba DJP, this matter was enrolled on the special motion court roll. The matter involved the adjudication of an issue which was separated from the other issues in terms of Rule 33(4). The plaintiffs and second defendant formulated a stated case in respect of the separated issue, which they sought the court to adjudicate upon. The separated issue concerned a plea raised by the second defendant in its amended plea and was to be argued on the papers.

[2] There were initially three plaintiffs involved in the matter. The stated case related to the three plaintiffs; however, the third plaintiff had recently passed away and since an executor had not been appointed for her estate, the matter could not be heard in her absence. The parties had earlier in that week held a pre-trial conference wherein it was agreed that the matter should proceed only in respect of the first and second plaintiffs ("the plaintiffs") as between them and the second defendant.

Background

[3] Essentially, how this matter came about is that the first and second plaintiffs and their wives, one being the third plaintiff and another party, were, on the day in question, having a family meal together. They wanted to heat up their food, which was in little three-legged pots, by using ethanol gel (which is

referred to as Flaz Gel product in the papers). The gel was contained in tin cups and was placed underneath the pots.

[4] It appears that at some point in time, one spouse of one of the plaintiffs, indicated that the flame in her pot had gone out and asked that it be refilled with the gel. While it was being so refilled, there was an explosion. After the explosion, the three plaintiffs were covered by this gel, all in varying degrees, on their bodies, and they sustained burns as a result thereof. Pursuant to the injuries sustained, the plaintiffs instituted action against the first and second defendants.

[5] It is alleged by the plaintiffs in their particulars of claim that the Flaz Gel product which allegedly caused their injuries, was bought by the first plaintiff at a retailer called Brits Karavane one month before the incident, that it was manufactured by the first defendant and was distributed by the second defendant.

[6] The plaintiffs alleged that they suffered bodily injuries as a result of the wrongful and negligent conduct of the first defendant, whom they allege was the manufacturer of the Flaz Gel product. A typical delictual claim was brought against the first defendant by alleging a duty of care and negligent conduct on the part of the first defendant. In the alternative to this delictual claim, a claim was instituted against the first defendant based on the provisions of Section 61 of the Consumer Protection Act ("the CPA").[1] In the case of the second defendant, whom it is alleged was the wholesale distributor of the Flaz Gel product to retailers such as Brits Karavane, a claim was brought only in terms of section 61 of the CPA.

[7] Section 61 of the CPA provides that each of the producers, importers, distributors or retailers of a particular product is strictly liable for any harm caused where the product was unsafe, had a product failure, defect or hazard or was provided with inadequate instructions or warnings in relation to any hazard arising from or associated with the use of the product. Each producer, importer, distributor and retailer is jointly and severally liable. As such, a claim

[1] Act 68 of 2008.

in terms of section 61 of the CPA is based upon strict liability where the plaintiffs need not prove wrongfulness and negligence.

[8] As the stated case deals only with the second defendant, it is the second defendant's plea that will be considered. In its plea, the second defendant invoked the provisions of section 69 of the CPA and denied that the plaintiffs were entitled to claim on the basis of the stipulations of section 61 of the CPA. The contention is that the plaintiffs, having elected to exercise their purported (but denied) rights against the second defendant based on the provisions of the CPA, should comply with the requirements thereof.

[9] Section 69(a) to (c) of the CPA prescribes a variety of statutory remedies for the enforcement of consumers' rights (such as the plaintiffs), which includes, *inter alia*, referring a dispute to the Consumer Tribunal, approaching an applicable ombud with jurisdiction or industry ombud; filing a complaint at the Consumer Court of the province with jurisdiction over the matter; referring the matter to another alternative dispute resolution agent in accordance with section 70 of the CPA; or filing a complaint with the Consumer Commission in accordance with section 71 of the CPA. In addition, in terms of section 69(d) of the CPA, the consumers (such as the plaintiffs) are entitled to approach a court (such as this one) with jurisdiction if all other remedies available to the person in terms of national legislation have been exhausted.

[10] The second defendant's proposition is that in order to succeed in their claim, the plaintiffs must allege and prove that they have exhausted the remedies prescribed in section 69(a) to (c) of the CPA, and having failed to do so, the court should refuse to entertain and adjudicate this action.

[11] The plaintiffs recorded in the stated case that they agree that they have not alleged, nor exhausted any of the remedies as prescribed in section 69(a) to (c) of the CPA, but argued that in law, it is neither necessary to allege such remedies having been exhausted, nor is it necessary to prove same, in respect of a claim such as the present one, which relates to personal injuries. In the ultimate, the plaintiffs and the second defendant, in the stated case, seek an

order either upholding the plea raised by the second defendant, or dismissing same.

Issue

[12] What seems to be the issue herein is whether the plaintiffs should have pleaded the provisions of section 69(a) to (b) of the CPA in their particulars of claim by making averments of their compliance with the provisions of that section. Put differently, the issue is whether the plaintiffs should have alleged in the particulars of claim that they have approached this court after having exhausted the remedies provided for in section 69(a) to (c) of the CPA.

[13] This issue is underscored by the question of whether in the circumstances of this case, where the claim is for damages for personal injury, the provisions of section 69(a) to (c) of the CPA create a mandatory route that needs to be followed, or can the dissatisfied/ injured consumer (the plaintiffs) have approached the court directly, as the plaintiffs did, without exhausting the different routes laid down in section 69(a) to (c) of the CPA, or in fact, in terms of the national legislation as proclaimed in the CPA.

Discussion

[14] The problematic part of section 69 of the CPA appears to be sub-section (d)[2] which provides that a consumer is to approach a court with jurisdiction if all other remedies available to that person in terms of national legislation have been exhausted.

[15] The second defendant, in its amended plea, suggests that the consumers are forced to exhaust all the other remedies set out in section 69 like filing a complaint at the National Consumer Commission, referring a dispute

[2] Section 69 (d) of the of the CPA reads: "... approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. "

to the Consumer Tribunal, and approaching an industry ombud, before coming to court. The plaintiffs on the other hand are of the view that this can never be the correct position and can never be what the legislature had intended.

[16] If it were to be found that the plaintiffs were forced to first exhaust the remedies provided for in section 69(a) to (c) of the CPA before approaching the court to enforce their rights, it will mean that it was upon the plaintiffs to allege, in the particulars of claim, and to subsequently prove that they exhausted all the remedies provided for in section 69. However, if it is to be found that the law does not force the plaintiffs to exhaust all these remedies, then in that event, it would not have been necessary for the plaintiffs to allege in the particulars of claim and to subsequently prove the exhaustion of the remedies.

[17] In argument for and against support for their respective approaches, the parties referred to a number of judgments. From these judgments, it appears that issue of whether a consumer must exhaust all the remedies provided for in section 69 before approaching the court, has not been finally decided. This position is confirmed in the Supreme Court of Appeal judgment that was referred to by the parties, wherein it was stated that "*The section has caused considerable difficulty and is the source of conflicting judgments in the High Court*".[3] In that judgment, the point was raised, but not finally decided as the respondent therein who had raised the point, abandoned it in argument. That court, however, in *obiter*, made certain remarks which the parties are relying on in support of their respective arguments. The other matters referred to, which in any event contradict each other, are those of the lower courts, as such the Supreme Court of Appeal judgment, if applicable, would be the one to be followed under the circumstances.

[18] It is the plaintiffs' contention that the *obiter* remarks in *Motus*, were a guidance as to how the issue should be dealt with going forward, whereas it is the second defendant's argument that the *obiter dictum* does not detract from the principle that the obligations imposed by section 69 of the CPA must be complied with before a consumer can approach court directly with a claim

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[3] *Motus Corporation & Another v Wentzel* [2021] 3 All SA 98 (SCA) at para 25.

based on the CPA, and that the judgment is no authority that the remedies provided for in section 69 of the CPA ought not be exhausted first before a consumer can approach court for the enforcement of rights in terms of the provisions of the CPA.

[19] In the said *obiter* remarks, the Supreme Court of Appeal stated the following:

> "[26] The need for us to address the scope of s 69(d) fell away in argument, because Mr Botes SC, who appeared for Renault and Renault SA, indicated that he would not pursue the point as his clients preferred to address the issues of substance. Therefore, we did not hear full argument on the matter. The issues arising from the section will need to be resolved on another occasion. It suffices to say that the primary guide in interpreting the section will be s 34 of the Constitution and the guarantee of the right of access to courts. Section 69(d) should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress. A claim for cancellation of the contract and the refund of the price of goods on the grounds that they were defective falls under the *actio redhibitoria* and dates to Roman times. Our courts have always had jurisdiction to resolve such claims and there is no apparent reason why the section should preclude a consumer, at their election, from pursuing that avenue of relief until they have approached other entities.
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> [27] The section is couched in permissive language consistent with the consumer having a right to choose which remedy to pursue. Those in (a), (b) and (c) appear to be couched as alternatives and, as already noted, there is no clear hierarchy. Had that been the aim it would have been relatively simple to set the hierarchy out in a sequence that would have been apparent, not 'implied', and clear for the consumer to follow. Furthermore, subsection (d) does not refer to the consumer pursuing all other remedies 'in terms of this Act', but of pursuing all other remedies available in terms of national legislation. That could be a reference to legislation other than the Act, or to the remedies under both the Act and other applicable consumer legislation, such as the National Credit Act 34 of 2005. Given the purpose of the Act to protect the interests of the consumer, who will always be the person seeking redress under it, there is no apparent reason why they should be precluded from pursuing immediately what may be their most effective remedy. Nor is there any apparent reason why

the dissatisfied consumer who turns to a court having jurisdiction should find themselves enmeshed in procedural niceties having no bearing on the problems that caused them to approach the court.

[28] One further matter deserves mention. The contract between Ms Wentzel and the first appellant dealt specifically with this question. It provided in clause 6.1 that if she had a complaint, or a dispute arose, the parties would endeavour to resolve it within seven days, failing which it could be referred to MIOSA. However, clause 6.2 said:

> 'Notwithstanding the contents of clause 6.1, either party has the right to approach a competent court for urgent redress.'

Is such a contractual provision binding? It is easy to think of instances where one or other of the parties to a dispute would want urgent relief, but the stringent construction that some courts have put on s 69(d) would, if correct, appear to preclude it. That in turn, takes us back to s 34 of the Constitution and a possible issue over the constitutional validity of the section. In view of the approach by Renault and Renault SA, we do not have to consider these problems in this case, but any court seized of a similar contention will need to consider the issues we have mentioned and, no doubt, others that have not occurred to us."

[20] As a point of departure, it is worthy to note that this case is distinguishable from the current matter on many levels. The Supreme Court of Appeal matter was brought to court on application whereas the current matter is an action. Secondly, the cause of action in *Motus* was based on fair contract terms whereas the current matter is based on product liability. As such, the sections of the Act on which the two judgments rely are also different. In *Motus,* the essential basis of the claim was that the applicant was in breach of sections 49(1)(b), 55(2)(b) and (c) and 56(3) of the CPA in that the appellant sold the respondent a new motor vehicle that was woefully defective. To the contrary, in the current matter, the essential basis of the claim is section 61 of the CPA, which is a claim of damages for bodily injuries.

[21] The Constitutional Court in *Chirwa*,[4] held that where a specialised framework has been created for the resolution of disputes, parties must pursue

[4] *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC).

their claim though such mechanism. Relying on this judgment, counsel for the second defendant submitted that the plaintiffs should have utilised any of the remedies and/or dispute resolution mechanisms available in terms of the CPA.

[22] The mechanisms that the second defendant sought to rely on, those contained in section 69, appear to be in respect of the enforcement of rights relating to fair contractual terms. The argument, in fact of both parties, if the judgments they referred to are considered, are in relation to the enforcement of rights relating to fair contractual terms. For example:

> The claim in *Joroy,*[5] pertained to an application for a refund of the full purchase price of a motor vehicle that the applicant bought from the respondent. The basis of the applicant's claim under the CPA was specifically sections 55 and 56 which deal with the consumer's rights to good quality goods.
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> In *Nzwana*,[6] the application pertained to the confirmation of the return of a motor vehicle with refund of the purchase price paid. The court found that the applicant's claim was based on sections 20(1)(a) and 20(2) of the CPA which pertain to the consumer's right to the return of goods; and sections 56(1) and (2) of the CPA which deal with implied warranty of goods.
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> The *Takealot* judgment[7] was in respect of a franchise agreement. The court found that the applicant's fundamental claim, once distilled from the various allegations made in relation to the respondent's conduct in terms of clause 5.2.1 of the franchise agreement, was essentially that the clause was an unreasonable, unfair or unjust contractual term, that is, section 48 read with section 52 of the CPA found application.
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> The essential basis of the claim in *Motus*, as already stated earlier in this judgment, was that the applicant was in breach of sections 49(1)(b),

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[5] *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB).
[6] *Nzwana v Dukes Motors t/a Dampier Nissan* [2019] ZAECGHC 81.
[7] *Takealot Online (RF) (Pty) Ltd v Driveconsortium Hatfield (Pty) Ltd - Application for Leave to Appeal* [2021] ZAWCHC 280.

55(2)(b) and (c) and 56(3) of the CPA in that the appellant sold the respondent a new motor vehicle that was woefully defective.

[23] The question, therefore, is whether the remedies provided for in section 69 of the CPA, which clearly are applicable in cases where the claim is based on fair contractual terms, may also be applicable where the claim is based on product liability in terms of section 61 CPA.

[24] Section 61 of the CPA, as stated, deals with the liability for damage caused by goods. The section imposes liability on the producer or importer, distributor or retailer of any goods for any harm caused wholly or in part as a consequence of supplying unsafe goods; product failure, defect or hazard in any goods; or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods. The liability for damage is imposed irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

[25] The harm contemplated in this section includes the death of, or injury to any natural person; an illness of any natural person; any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable, and any economic loss that results from harm contemplated in the afore stated.[8]

[26] Additionally, subsection 61(6) provides that nothing in this section limits the authority of a court to: assess whether any harm has been proven and adequately mitigated; determine the extent and monetary value of any damages, including economic loss; or apportion liability among persons who are found to be jointly and severally liable.

[27] The plaintiffs' submission is that it is only a court that is empowered by subsection 61(6) of the CPA to adjudicate claims instituted in terms of section 61. The plaintiffs arrive at such conclusion, apparently, by a parity of reasoning based on the provisions of section 52 read with section 48 of the CPA. They argued that section 52 of the CPA provides for circumstances where a remedy

[8] Section 61(5).

is not sufficiently provided in this Act to correct the relevant prohibited conduct, unfairness, injustice or unconscionability.

[28] Section 52(1) of the CPA stipulates that if, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that the supplier contravened section 40, 41 or 48; and this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of the Act, and the matter set out in subsection (2), may make an order contemplated in subsection (3).

[29] Section 48 of the CPA provides that a supplier must not offer to supply, supply, or enter into an agreement to supply any goods or services the contract terms of which are unfair, unreasonable or unjust.

[30] In *Takealot*, the court concluded, correctly so, that:

> ". . . only a court of law can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of section 48 of the CPA. An arbitrator, the Commission or Tribunal, is not empowered in terms of the act to deal with these kinds of matters."[9]

[31] The plaintiffs submitted that like section 52, section 61 of the CPA provides for circumstances where a remedy is not sufficiently provided in this Act to correct the relevant prohibited conduct, unfairness, injustice or unconscionability.

[32] It is common cause that the plaintiffs' cause of action is for damages based on personal injuries sustained by the plaintiffs, that is, harm allegedly caused by unsafe or hazardous goods. The plaintiffs' proposition that by a parity of reasoning based on the provisions of section 52 read with section 48 of the CPA, it is only a court that can adjudicate a claim for damages based on personal injuries, is correct. This is so because as provided for in section 52 where a remedy is not sufficiently provided in this Act, the court must adjudicate the claim. Similarly in this instance, except as provided for in subsection 61(6)

[9] Id at para 15.

of the CPA, there is no remedy provided for in this Act for a claim based on product liability in terms of section 61. It can, therefore, be inferred that it is only a court that can adjudicate a claim of this nature.

[33] The court in *Steynberg*,[10] discussed, at length, the remedies provided for in the CPA and found none available for a claim based on section 48 of the CPA. The following remarks were made in that judgment:

> "REMEDIES CONTEMPLATED IN THE CPA
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> 11 The objection to the court's jurisdiction requires a consideration whether the CPA otherwise provides a remedy sufficient to correct the beaches that the applicant alleges occurred.
>
> 12 No reference was made in argument to the existence of a consumer court and I can find no reference to such a court having been established, as envisaged in the CPA, in terms of any provincial consumer legislation. It appears therefore that this avenue is not available to the applicant.
>
> 13 A Consumer Goods and Services Ombud has been established purportedly in terms of section 86(6). It defines itself, as stated on its website, as an independent body whose function is to "*mediate and resolve complaints lodged by private citizens against businesses or other entities*". It reports to the National Consumer Commission. No submissions were made by the respondent regarding the applicant's ability to obtain the relief she seeks from the Consumer Goods and Services Ombud. Considering the facts, I do not believe that a referral to this ombud would be appropriate or sufficient to deal with the applicant's complaint. It is doubtful that the relevant ombud has the power to grant the applicant the relief she seeks in this application.
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> 14 A "Tribunal" is defined in terms of the CPA as the National Consumer Tribunal established by section 26 of the National Credit Act. The Tribunal's powers in terms of its rules are as follows:
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> 3. Powers of the Tribunal

[10] *Christina Johanna Steynberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd* (Case No. 23655/2021) at para 11 – 15.

(1) The Tribunal may deal with a matter:-

(a) listed in Table 1A and Table1B of these rules;

(b) referred to the Tribunal in terms of s134(2)(c) of the Act;

(c) originating as a complaint to the Regulator or arising from a complaint, and referred to the Tribunal in terms of s137(1), s140 or s141(1)(b) of the Act;

(d) which is referred to the Tribunal in terms of s137(3) of the Act;

(2) The Tribunal may-

(a) grant interim relief in respect of a matter described in rule 3(1)(c);

(b) confirm a consent agreement entered into between parties (s 138);

(c) consider applications related to an adjudication process-

(i) to intervene in proceedings in terms of rules 11 and 12

(ii) to amend documents in terms of rule 15;

(iii) to change the forum at which a matter will be heard in terms of section 140(4) or 141(2)(a);

(iv) to condone non-compliance with the rules and proceedings of the Tribunal;

(v) for an order of substituted service in terms of rule 30;

(vi) to grant a default order in terms of rule 25; or

(vii) relating to other procedural matters;

(d) . . .

(f) deal with any other matter in accordance with rule 10.

15 Rule 10 provides as follows:

10 Applications in respect of matters not provided for in the rules

(1) A person wishing to bring before the Tribunal a matter which is not listed in rule 3, or otherwise provided for in these rules, must first apply to the High Court for a declaratory order confirming the Tribunal's jurisdiction-

(a) to deal with the matter;

(b) to grant the order to be sought from the Tribunal.

16 The powers of the Tribunal are circumscribed by its rules. It does not appear to have the power to grant declaratory relief or deal with claims for the payment of money. Furthermore, the Tribunal does not appear to have the power to deal with contraventions of section 40, 41 and 48. This has been specially entrusted to the court in terms of section 52(2). I am of the view, considering the principles, purposes and provisions of the CPA, that the National Consumer Tribunal would not be in a position to provide a remedy sufficient to correct the infringements complained about by the applicant."

[34] All these remedies, although they were researched in respect of claims for section 48 of the CPA, are not available for claims emanating from section 61 of the CPA. In particular, claims in respect of damages emanating from personal injuries as stipulated in section 61(5)(a) of the CPA.

[35] Enforcement of any right in terms of the Act or in terms of a transaction or agreement, or otherwise to resolve any dispute with a supplier, is by referring the matter directly to the Tribunal or to the applicable ombud.

[36] It is obvious that there is no applicable ombud with jurisdiction to adjudicate disputes relating to product liability, particularly where the harm has resulted in an injury of a natural person. Needless to say that the powers and authority of the National Consumer Tribunal would not, as well, extend to dealing with a claim based on damages which arise from personal injuries.

[37] The alternative remedies provided for in section 70 suggested by the second defendant's counsel and section 71 of the CPA, would have served no purpose if they were followed by the plaintiffs. It is evident that in the final analysis for these remedies to be of assistance to the plaintiffs, there would have to be consent between the parties. As it is, the parties have been at each other's throats since 2017, there appears no likelihood that a resolution of this matter following these remedies, would have been achieved.

[38] Considering the facts of this matter, it is obvious that a referral to either the ombud, the Tribunal or for dispute resolution in terms of sections 70 and 71 of the CPA, would not have been appropriate or sufficient to deal with the plaintiffs' claims. It is doubtful that either of these remedies would have been able to grant the plaintiffs the relief they sought.

[39] As correctly stated by Kuny J in *Takealot*,[11] the objection to the court's jurisdiction requires a consideration whether the CPA otherwise provides a remedy sufficient to correct the beaches that the applicant alleges occurred. The section 69 remedies do not suffice to correct the breaches alleged by the plaintiffs in the current matter. This has been specially entrusted to the court in terms of section 61(6) of the CPA.

[40] In the result it is concluded that the stated case should be upheld in favour of the applicants. There was thus no need for the plaintiffs to allege, in the particulars of claim, that they have complied with the remedies provided in section 69 of the CPA; nor was it necessary to declare that the remedies in section 69 of the CPA were not available to the plaintiffs' claim.

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[11] Ibid Para 11.

Costs

[41] The parties agreed that costs to be awarded in this matter should, in terms of rule 69, be on scale C. The parties urged the court to exercise its discretion in awarding costs on the agreed scale, taking into account the complexity of the matter, the issues in dispute, the importance thereof to the parties, and any other issues which may be relevant in the circumstances.

[42] Additionally, the plaintiffs' counsel, prayed for the costs, if granted in the plaintiffs' favour, to include the employment of two counsel.

[43] The issues raised in the stated cases are indeed complex and required the employment of two counsel. This was, also, not opposed by the second defendant. The complexities of the matter and the importance thereof to the parties warrants that costs be awarded on scale C.

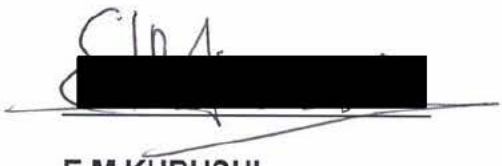
[44] The plaintiffs are the successful parties and should therefore be awarded costs on scale C, which costs should be inclusive of the employment of two counsel, one junior and one senior.

Order

1. The second defendant's plea is dismissed.

2. Costs are awarded to the plaintiffs on scale C.

3. The costs are inclusive of the employment of two counsel, one junior and one senior.



E M KUBUSHI

Judge of the High Court

Gauteng Division

Appearances:

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Date of argument:		19 April 2024
Date of judgment:		14 November 2024