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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 2023-085773**

1. REPORTABLE: ~~YES~~/ NO  
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
3. REVISED: ~~YES~~/ NO  
DATE: 14 March 2025  
SIGNATURE OF JUDGE:

In the matter between:

**CLINIX HEALTH GROUP (PTY) LTD**

**Applicant**

and

**PEIRRE BADENHORST ENGINEERS INC**

**1<sup>st</sup> Respondent**

**TOM MCDONALD N.O**

**2<sup>nd</sup> Respondent**

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**JUDGMENT**

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**MEADEN AJ**

On 08 NOVEMBER 2024 upon hearing counsel for the parties and considering the papers, I handed down the following Order:

[1] *“The application is dismissed with costs at scale C.”*

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The above Order was handed down, taking consideration of the undermentioned:

- [1] This is an application entailing the review and setting aside of an arbitration award made by the 2<sup>nd</sup> respondent in his capacity as arbitrator on 19 July 2023. This arbitration award is annexed as “Annexure FA01” to the Applicant’s Founding Affidavit.<sup>1</sup>
- [2] In this review application, the applicant contends that the 2<sup>nd</sup> respondent misconducted himself in re his duties as arbitrator, in the process exceeding his powers and committing a gross procedural irregularity. This is alleged in circumstances where the 2<sup>nd</sup> respondent, according to the applicant, decided the dispute arising between the applicant and the 1<sup>st</sup> respondent (“the parties”) and on the basis of a case that was not pleaded, presented, nor argued before the 2<sup>nd</sup> respondent.
- [3] In these circumstances, the applicant seeks to have the above arbitration award set aside in terms of section 33(1) of the Arbitration Act 42 of 1965 (‘the Arbitration Act’). The salient portion of section 33(1) references:

***“33. Setting aside of award***

*(1) Where-*

*(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or*

*umpire; or*

*(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings*

*or has exceeded its powers; or*

*(c) ...*

*the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”*

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<sup>1</sup> FA 01-46 – 01-85.

[4] Presented with the above High Court application, the 2<sup>nd</sup> respondent did not take issue with nor oppose this application, preferring to abide the outcome of this application including the above order handed down.

[5] In contextualizing the factual circumstances of this matter:

5.1 The applicant and 1<sup>st</sup> respondent entered into PROCSA Client/Consultant Professional Services Agreements for:

5.1.1 CIVIL ENGINEER<sup>2</sup> (Edition 4.0 October 2017), (applicable work – full civil engineering services for the new hospital and external works for Clinix Health Group on Erf 1[...], P[...] G[...] Ext 12); and

5.1.2 STRUCTURAL ENGINEER<sup>3</sup> (Edition 4.0 October 2017), (applicable work – full structural engineering works for the new hospital and external works for Clinix Health Group on Erf 1[...], P[...] G[...] Ext 12).

5.2 The effective dates of the above professional service agreements were 05 March 2018 vis-à-vis the proposed Dr Nthato Motlana Memorial Hospital – Protea Glen - Site identification and address: Erf 1[...], P[...] G[...] Ext 12 (“the project”).

5.3 Per the above PROCSA professional service agreements, the contracting parties on the above project were:

5.3.1 Client – Clinix Health Group (CHG) (applicant)<sup>4</sup>;

5.3.2 Consultant – Pierre Badenhorst Engineers Inc (1<sup>st</sup> respondent).

5.4 The appointed Principal Agent cited in the above agreements was VSB Quantity Surveyors CC (VSB). This entity was also cited as a consultant, being the appointed Quantity Surveyor to the above project.<sup>5</sup>

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<sup>2</sup> Annexure FA02/01-86 – 01-115.

<sup>3</sup> Annexure FA03/01-116 – 01-144.

<sup>4</sup> Annexure FA02/01-98 – 01-99.

<sup>5</sup> Annexure FA02/01-99 – 01-100; FA03/01-129 – 1-01-130.

- 5.5 These agreements also cited additional consultants, which over and above the aforesaid applicant and 1<sup>st</sup> respondent, constituted the Planning and Design Coordination Team employed by the applicant and which was further supplemented from time to time with additional consultants where needed and as effect was given and progress made on the rollout of the project and applicable works.
- 5.6 In actually giving effect to the above project and over the period 06 March 2018 – 29 October 2019; a series of minuted Planning and Design Coordination Meetings involving the participation of the Client, Principal Agent, Architect and various professional consultants (including that of the 1<sup>st</sup> respondent) took place. These Planning and Design Coordination minutes were incorporated in the court bundle<sup>6</sup>, and were compiled by the above Principal Agent – VSB.
- 5.7 In essence, the above Planning and Design Coordination meetings contended with issues arising on a daily/weekly basis in giving effect to the rollout of the project and related works. These Planning and Design minutes contextualized the circumstances at hand and being contended with by the applicant in conjunction with the principal agent and consultants in re the project. Further reference will be made to applicable minutes of the Planning and Design Coordination Meetings in the unfolding circumstances of the matter contended with below.

[6] The PROCSA style agreements concluded as between the applicant and 1<sup>st</sup> respondent comprised the undermentioned stages:

- 6.1 Stage 1: Inception;<sup>7</sup>
- 6.2 Stage 2: Concept and Viability;<sup>8</sup>
- 6.3 Stage 3: Design Development;<sup>9</sup>
- 6.4 Stage 4: Documentation and Procurement;<sup>10</sup>

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<sup>6</sup> 04-1100 – 04-1248.

<sup>7</sup> Applicant's FA, 01-12 at para 23.1.

<sup>8</sup> Applicant's FA, 01-12 at para 23.2.

<sup>9</sup> Applicant's FA, 01-12 – 01-13 at para 23.3.

6.5 Stage 5: Construction;<sup>11</sup> and

6.6 Stage 6: Close Out<sup>12</sup>.

- [7] At the Planning and Coordination Design meeting held on 21 May 2019 (meeting no. 21) it was specifically minuted by the principal agent that:

***“3.2 APPOINTMENTS***

*3.2.1 PROCSA documents to be revised. CHG will meet with each consultant individually. Consultant services to terminate after stage 4.”<sup>13</sup>*

- [8] This was reiterated in the ensuing Planning Meeting no. 22 held on 20 August 2019 and again at item 3.2.1 of these minutes.<sup>14</sup>

- [9] Then in Planning Meeting no. 23 held on 29 October 2019 and per the minutes contained therein, under “CLIENT MATTERS” the following was recorded:

*“2.3 CHG will pay outstanding invoices submitted to date from PIC funding. Invoice details do not have to change – changes with regards to VAT numbers, etc will only be implemented after first payments are done.*

*2.4 VSB to send updated summary of invoices submitted to date to CHG.*

*2.5 Fees for work done by all consultants to date to be updated – VSB will contact each team member to finalize.”<sup>15</sup>*

- [10] The above directions emanating from the applicant as minuted in the above Planning & Design Coordination Meeting No. 21 – 23, were circulated by the principal agent in the space of six months with the various consultants and in the course of the aforesaid Planning and Design Coordination meetings. These directions entailed a material and substantial deviation from that set out per the above defined stages of the PROCSA agreements and with the applicant

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<sup>10</sup> Applicant's FA, 01-13 at para 23.4.

<sup>11</sup> Applicant's FA, 01-13 – 01-14 at para 23.5.

<sup>12</sup> Applicant's FA, 01-14 at para 23.6.

<sup>13</sup> Minutes of Planning and Design Coordination Meeting 21- 04-1266.

<sup>14</sup> Minutes of Planning and Design Coordination Meeting 22- 04-1273.

<sup>15</sup> Minutes of Planning and Design Coordination Meeting 23 - 04-1280.

terminating works and services of the various consultants (including the 1<sup>st</sup> respondent) upon the completion of stage 4 of the PROCSA agreements.

[11] This was further summarized in the arbitrator's award<sup>16</sup> and where the arbitrator recorded inter alia; that the above minutes revealed:

- 11.1 The applicant's commitment to pay its professional consultants up to the termination of stage 4;
- 11.2 the principal agent being directed to update the total fees due to the various professional consultants, and
- 11.3 the professional consultants to invoice the applicant hereon and the applicant then to pay such invoices out of PIC funding.

[12] This came about in circumstances where upon regard being had to the various construction tenders being received and considering the lowest bid tabled by Tri-Star Construction; this tenderer proposed the conclusion of an Engineering Procurement and Construction (EPC) style contract and which then found favour with the applicant and would supersede the previously concluded PROCSA style agreements.

[13] With this, the various consultants were then to be paid by the applicant on all updated invoices submitted and again per the above minutes of 29 October 2019. The various consultants' fees invoiced for works to the conclusion of stage 4 were to be updated by the principal agent and in consultation with the consultants. Here, the applicant mandated the principal agent to establish and determine the updated fees of the consultants arising vis-à-vis their respective PROCSA agreements. This culminated in the principal agent, just short of a year later, providing the applicant with a "DR NMM HOSPITAL: PROFESSIONAL FEE SUMMARY"<sup>17</sup> dated 08 September 2020.

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<sup>16</sup> Annexure FA01/ 01-102 at para 101.

<sup>17</sup> Annexure SOC 14 – 04-286.

[14] In these circumstances, the 1<sup>st</sup> respondent then based its claim on the above updated “DR NMM HOSPITAL: PROFESSIONAL FEE SUMMARY” compiled by the principal agent and which arrived at the undermentioned total:

|      |                        |                                    |
|------|------------------------|------------------------------------|
| 14.1 | Structural engineering | R 2 213 888.79 (excl. vat);        |
| 14.2 | Civil engineering      | <u>R 1 539 049.73</u> (excl. vat); |
| 14.3 | Subtotal (excl. vat)   | <u>R 3 852 938.52</u> (excl. vat); |
| 14.4 | Vat                    | R 577 940.78                       |
| 14.5 | Total                  | <u>R 4 430 879.30</u> (vat incl.)  |

[15] The 1st respondent then compiled and presented to the applicant, tax invoice 3074 in the sum of R 4 430 879.30 (vat incl.) and in so doing, accepted the principal agent’s above professional fee summary relating to the 1st respondent. The principal agent in proceeding as above, abided the directions of the applicant and as minuted in the above Planning and Design Coordination meetings and which culminated in the production, inter alia, of the aforesaid professional fee summary and ensuing invoice from the 1<sup>st</sup> respondent.

[16] It is further noteworthy here that the principal agent was also the applicant’s appointed quantity surveyor on the project and enjoyed comprehensive insights on the scope and extent of the works and costings attributed thereto.

[17] It is useful here to contextualize the role of the principal agent. In *Aveng Grinaker v MEC Department of Human Settlements*<sup>18</sup> it was confirmed that the principal agent represents the client/employer in the capacity of a key independent professional role player. The principal agent’s role contributes to the strengths or weaknesses of the entire building project and the principal agent manages the services of all consultants during the project implementation, ensuring that the best interests of the client/employer are served. The principal agent here issues instructions on behalf of and binds the client/employer. The authority of the principal agent in confirming payment obligations due by the client/employer in favour of independent professional

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<sup>18</sup> (EL459/15) [2018] ZAECELLC 3; [2018] 3 All SA 466 (ECLD, East London) (5 June 2018).

consultants and further in authorizing payment and binding the client/employer hereto is not in dispute.

[18] Per the definition of principal agent in the above PROCSA agreements<sup>19</sup>, a principal agent is described as the entity named in the schedule, appointed and authorized by the client as agent to manage and administer the contracts. In compiling and presenting the above DR NMM HOSPITAL: PROFESSIONAL FEE SUMMARY, the principal agent abided the directions of the applicant in updating the professional fee summary and then binding the applicant hereto. This was confirmed by the 2<sup>nd</sup> respondent in his above arbitration award and I concur with this conclusion of the 2<sup>nd</sup> respondent.<sup>20</sup>

[19] In being presented with the 1<sup>st</sup> respondent's above invoice and taking account of interim payments already made in aggregate of R 3 429 923.57 in favour of the 1<sup>st</sup> respondent for services rendered, the applicant in turn refused to effect payment of the balance then outstanding (per the professional fee summary presented by the principal agent and quantity surveyor and invoiced on by the 1<sup>st</sup> respondent to the applicant) or to compromise hereon and effect payment in favour of the 1<sup>st</sup> respondent.

[20] Instead, the applicant sought to sideline its principal agent and quantity surveyor and proceeded in engaging with third parties, including Glenro Commercial & Construction Consultants (Pty) Ltd and of which there is no record of prior involvement in the above project and in attempting to assess the scope and extent of the works of the 1<sup>st</sup> respondent.

[21] This then culminated in a dispute arising between the applicant and 1<sup>st</sup> respondent and in these circumstances, the 1<sup>st</sup> respondent on 25 October 2021 engaged with the Association of Arbitrators (Southern Africa) ('the Association') regarding the appointment of an arbitrator to contend with:

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<sup>19</sup> Annexure FA02/01-90 at 1.1.15 and FA03 – 01-120 at 1.1.15.

<sup>20</sup> Annexure FA01/01-102 at para 102.

*“Dispute in terms of PROCSA Agreement clause 13.0, 13.1., 13.3. Non-payment of invoices. Clinix disputes amount to be paid, not paying invoices in full, not disputing the invoice to clause 13.3. Also not in agreement with the fee structure as set out in contract.”*

[22] Ultimately, this dispute became the subject of arbitration proceedings convened before the 2nd respondent – Tom McDonald N.O and who was then presented and contended with the above factual matrix.

[23] In the course and scope of the conduct of these arbitration proceedings, the applicant engaged independent experts - Messrs Zimba and Wickham and the 1<sup>st</sup> respondent in turn engaged Mr. Von Geusau. In so doing, further disputes arose as between these experts.

[24] The 2<sup>nd</sup> respondent concluded that Wickham, Zimba and Geusau all provided somewhat different evaluations of the percentage works undertaken and completed by the 1<sup>st</sup> respondent.<sup>21</sup> In understanding and appreciating the above factual matrix; the 2<sup>nd</sup> respondent inter alia had regard to the principal agent's minutes no. 21 – 23 and ensuing professional fee summary and related documentation. The principal agent was intimately involved in the project and had the 2<sup>nd</sup> respondent not so done, then he may have placed himself at risk of being accused of being remiss.

[25] According to the applicant, the 1<sup>st</sup> respondent required to prove how much work was completed by it and with that, the associated entitlements to fair value for services rendered in relation to such work.<sup>22</sup> Per the applicant, the 2<sup>nd</sup> respondent required to determine how much of the work had been completed by the 1<sup>st</sup> respondent and consequently, what was the fair value payable by the applicant to the 1<sup>st</sup> respondent for the services rendered in accordance with the PROSCA agreements.

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<sup>21</sup> Annexure FAO1/ 01-81 at para 193-194.

<sup>22</sup> Applicant's Replying Affidavit/ 01-270 at para 25.1.

[26] In this context, the applicant attempted and for purposes of this review application to limit the ambit of the inquiry of the 2<sup>nd</sup> respondent to that of considering the evidence of the various experts for purposes of determining the percentages of works completed by the 1<sup>st</sup> respondent in the various stages of the services referenced in the civil and structural engineering PROCSA agreements. This is then entrenched by the applicant and in it averring that the 2<sup>nd</sup> respondent exceeded his power qua arbitrator, misconducted himself in relation to his duties and committed a gross irregularity by:

- 26.1 *“Determining that the Parties amended the Agreements as set out in the minutes of the Planning and Design Coordination Meetings No 21, No 22 and No 23 (hereinafter referred to as the “Amended Agreement Issue”) notwithstanding that this element did not form part of either Party’s pleaded case, with neither party leading evidence or providing argument in relation to the amendment to the Agreements, as found by the 2<sup>nd</sup> respondent”<sup>23</sup>;*
- 26.2 *determining that VSB was in a better position to determine the value of the services as rendered by the 1<sup>st</sup> respondent when this was not the case before the 2<sup>nd</sup> respondent and;*<sup>24</sup>
- 26.3 *breaching the provisions of Article 18 of the rules which provide: ‘Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given reasonable opportunity in presenting its case. The arbitral tribunal, in exercising its discretion shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute’<sup>25</sup>.*

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<sup>23</sup> Applicant’s Heads of Argument/06-38 at para 76.1. .

<sup>24</sup> Applicant’s Heads of Argument/06-39 at para 76.2.

<sup>25</sup> Applicant’s Heads of Argument/06-39 at para 76.3.

- [27] The aforesaid stands to be reconciled against the actual dispute declared by the 1<sup>st</sup> respondent and referred to ad paragraph 21<sup>26</sup> above. Clearly in this regard, the dispute was not limited and as framed and set out in paragraph 26 above.
- [28] In this context, the 1<sup>st</sup> respondent contended that part of the documents received in evidence during the arbitration were the various minutes of the Planning and Design Coordination Meetings (incorporating minutes No. 21 – 23) and which minutes were attached to the 1<sup>st</sup> respondent's statement of case. Flowing herefrom was the production of the principal agent's professional fee summary of 8 September 2020<sup>27</sup> and which the 1<sup>st</sup> respondent accepted and relied on in presenting its tax invoice of 9 October 2020<sup>28</sup> to the applicant. There is no commercial and legal basis upon which the applicant can inhibit the 2<sup>nd</sup> respondent having regard to the above factual matrix in the course of the arbitration at hand.
- [29] The arbitrator, in giving consideration to the above factual circumstances, would have realized that consequent upon Planning and Design Coordination Meetings No. 21 – 23; the above PROCSA agreements were inter alia; to be summarily terminated upon the completion of stage 4, thus resulting in a variation of the contracting parties' rights and obligations under the PROCSA agreements and including the consultants performing up to completion of stage 4 of the works and with that then being remunerated therefor.
- [30] Presented with the above dispute, the 2<sup>nd</sup> respondent adopted a logical and practical approach in reviewing and being appreciative of the above factual matrix and in the process realizing that the PROCSA agreements were being prematurely terminated upon completion of stage 4 and with that followed the compilation and production of the principal agent's updated professional fee summary. This very fee summary had in turn been relied upon by the 1<sup>st</sup>

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<sup>26</sup> "Dispute in terms of PROCSA Agreement clause 13.0, 13.1., 13.3. Non-payment of invoices. Clinix disputes amount to be paid, not paying invoices in full, not disputing the invoice to clause 13.3. Also not in agreement with the fee structure as set out in contract."

<sup>27</sup> Annexure SOC 14.

<sup>28</sup> Annexure SOC 15.

respondent in invoicing the applicant as above. This then included the 2<sup>nd</sup> respondent taking consideration of the existence and participation of the principal agent that was also the project's appointed quantity surveyor. The principal agent was indeed in the best position to compile the updated fee summary and was directed so to do by the applicant and bound the applicant accordingly in so doing.

[31] The circumstances as framed in Planning and Design Coordination meetings No. 21 – 23 above brought about a change of direction in the project, including in re the envisaged termination of the PROCSA agreements and upon the various consultants achieving completion of stage 4.

[32] Further given the existence of a principal agent, in understanding the scope, extent and circumstances of the rollout of the PROCSA agreements; it was prudent for the 2<sup>nd</sup> respondent to take cognizance of, inter alia, the Planning and Design Coordination meeting minutes and specifically meetings No. 21 – 23 and with that the principal agent's updated fee summary. The principal agent here enjoyed a hands on and current insight on the scope and extent of the works of the various consultants and including that of the 1<sup>st</sup> respondent and further had been instructed by the applicant to value and update the various professional consultants' accounts as at the completion of stage 4 of the PROCSA agreements. The principal agent did this, thus culminating in its production of its revised professional fee summary of 08 September 2020 and which was then relied upon by the 1<sup>st</sup> respondent and in its ensuing production of its tax invoice 3074 dated 9 October 2020, duly addressed to the applicant.

[33] It is indeed doubtful here and certainly no insights have been provided by any of the litigants regarding Glenro Commercial & Construction (Pty) Ltd together with any of the independent experts introduced by the applicant and 1<sup>st</sup> respondent enjoying any superior knowledge and insights compared with that of the principal agent/project quantity surveyor. Further, had the 2<sup>nd</sup> respondent not given consideration to the insights of the appointed principal agent/quantity surveyor on the project as above, then undoubtedly; there would have been

room to criticize the 2<sup>nd</sup> respondent for being remiss and actually negligent in not so doing.

[34] Much is made here by the applicant of the 2<sup>nd</sup> respondent committing a gross irregularity in concluding that consequent on Planning and Design Coordination Meetings No 21- 23 as above, an amendment of the PROCSA agreement occurred. There is no substance to these allegations on the part of the applicant. The 2<sup>nd</sup> respondent certainly could not ignore the above summarized factual matrix in establishing the scope and extent of the works undertaken by the 1<sup>st</sup> respondent for stages 1 – 4 and then in attributing value thereto. Further, I can see no impediment in the 2<sup>nd</sup> respondent placing reliance on the advices and conclusions of the principal agent/project quantity surveyor.

[35] What is indeed noteworthy here, is that the applicant in opposing the 1<sup>st</sup> respondent's claim, did not reference formally taking issue with the underlying principal agent's professional fee summary of 08 September 2020 that was duly accepted by the 1<sup>st</sup> respondent and which in turn was premised on the insights of the project's quantity surveyor. I am not aware of any impediment arising in the applicant so doing. Had there been a genuine issue here, then and in giving effect to the criteria of the above PROCSA agreements, the applicant should have placed in contest the above professional fee summary presented by the principal agent and quantity surveyor and raised issue with these very entities. There is no substantive reference in this application to this ever occurring. In the absence of such disputes, refusing to pay on the principal agent's above requested updated professional fee summary, aside from being disingenuous; left the applicant financially accountable in favour of the 1<sup>st</sup> respondent and as confirmed in the 2<sup>nd</sup> respondent's above award. This review application in its own right is very narrow and contrived, disregarding the reality of the above factual matrix and serves only to aggravate the already tenuous position of the applicant vis-à-vis the 1<sup>st</sup> respondent.

[36] Accordingly, I conclude that the applicant has not made out a case regarding the 2<sup>nd</sup> respondent misconducting himself in relation to his duties as arbitrator

and in the process exceeding his powers and committing a gross procedural irregularity in the conduct of the above arbitration proceedings culminating in the 2<sup>nd</sup> respondent's award of 19 July 2023. This award remains of full effect and may at the 1<sup>st</sup> respondent's instance and request be made an order of court.

[37] In the circumstances I conclude that there are no valid and sustainable grounds upon which to review and set aside the arbitration award as published by the 2<sup>nd</sup> respondent on 19 July 2023.

## **ORDER**

Accordingly, I made the undermentioned order:

[1] *"The application is dismissed with costs at scale C."*

**MEADEN JR**  
**ACTING JUDGE OF THE HIGH COURT**

*This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 13h00 on this 14<sup>th</sup> day of March 2025.*

## **Appearances**

|                                       |                    |
|---------------------------------------|--------------------|
| <b>For Applicant:</b>                 | Adv. A Glendinning |
| <b>Instructed by:</b>                 | Neil Du Toit Inc.  |
| <b>For 1<sup>st</sup> Respondent:</b> | Adv. TJ Jooste     |
| <b>Instructed by:</b>                 | VFV Attorneys      |
| <b>Date of Hearing:</b>               | 08 November 2024   |

**Date of Judgment:**

14 March 2025