IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4906/2024

In the matter between:

TOLHOF GENERAL DEALER (PTY) LTD Applicant

and

COALITION TRADING 790 (PTY) LTD Respondent

Heard on: **19 August 2024**
Delivered on: **12 February 2025**

JUDGMENT

RALARALA, J

INTRODUCTION

[1] The Applicant has brought an urgent *ex parte* application that is divided into two parts. In Part A, the Applicant sought an order for the attachment of certain assets in possession

of the respondents that it claims are its movable property. In Part B, the Applicant seeks the removal of these assets. Fortuin, J granted the relief sought in Part A, and the matter was subsequently set down for hearing in respect of Part B and for the determination of the Respondent's Rule 7 notice dated 17 April 2024.

FACTUAL BACKGROUND

[2] The Applicant had a sole shareholder and director, Henning Petrus Cornelius Haarhoff *("Mr Haarhoff")* who passed away, and in his last will and testament appointed Jonathan Fabian De Jager *("Mr De Jager")* an attorney, to be a co-executor to his deceased estate. According to Mr Haarhoff's last will and testament, his 100% shareholding in the Applicant was bequeathed to Anna Hillagonda Sutherland *("Ms Sutherland")*. The Applicant instituted proceedings seeking an order to attach certain movable assets in possession of the Respondent on the basis that the assets belonged to the Applicant. Prior to filing its answering affidavit, the Respondent challenged the Applicant's authority to act as in its view, the Applicant became incapacitated upon the death of Mr Haarhoff and remains incapacitated.

[3] In the aforesaid notice, the Respondent challenged the authority of the Applicant to institute proceedings as well as the authority of Mr De Jager to act as the legal representative of the Applicant. In response to the Rule 7 Notice, the Applicant filed a supplementary affidavit. Subsequently the Respondent filed an answering affidavit addressing the Applicant's supplementary affidavit, and the Applicant, in turn, filed its replying affidavit. At the hearing of this application, the Respondent applied for the striking

out of certain paragraphs of the Applicant's replying affidavit, on the basis that new material was included, which was not only irrelevant, but also vexatious and /or are inadmissible hearsay.

[4] The court is called upon to determine two key issues. First, the authority of the Applicant to institute the application, particularly the authority of Mr De Jager as the attorney of record to act on behalf of the Applicant. Secondly, this court is enjoined to determine the Respondent's application to strike out. I consider it prudent to address the application to strike out before proceeding with the application in terms of Rule 7.

APPLICATION TO STRIKE OUT

[5] The Respondent seeks an order to strike out paragraphs 8,9,10, along with subparagraphs,11 to 25, and 38 of the Applicant's replying affidavit relating to the Rule 7 application. At the hearing, Mr McChesney, Counsel for the Respondent posits that the content of the aforementioned paragraphs is irrelevant, vexatious and /or are inadmissible hearsay. It is his contention that such content was meant to be traversed in the founding affidavit. Conversely, Ms Oosthuizen, Counsel for the Applicant, relying on *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and another* [2017] 4 All SA 624 (SCA), submitted that if the new matter raised in reply is in response to the answering affidavit, the court will allow it. Mr McChesney countered the argument and contended that Paragraph [10] of *Drift Supersand* does not assist the Applicant, as the new matter raised was such that it should have been included in the Founding Affidavit. As such, it was not a response to a defence, rather it constitutes a new matter. The Applicant is

purely introducing new assertions in reply, in his view. Counsel for the Respondent argued that the content of the aforementioned paragraphs would prejudice the Respondents, as it ought to have been included in the founding affidavit for the Respondent to duly respond and address same in its answer to the Applicant's supplementary affidavit.

[6] The paragraphs in issue detail the sequence of events subsequent to the death of Mr Haarhoff, mainly Mr De Jager's actions and interaction with Respondent's directors. Mr De Jager in the replying affidavit contends that the purpose of placing the contents of the said paragraphs before the court is to show the court that the directors of the Respondent had accepted his appointment as Applicant's director and agreed with his interpretation of the Memorandum of Incorporation. The Respondent in the Rule 7 notice and in its answer to the Applicant's supplementary affidavit disputed the Applicant's authority to institute the application and Mr De Jager's authority as an attorney to represent the Applicant in these proceedings. In my opinion, Mr Hughe's (director of the Respondent) prior knowledge of Mr De Jager's directorship in the Applicant is not an answer to any defence raised by the Respondent in their answer to the Applicant's supplementary affidavit responding to the Rule 7 notice, nor is it of any relevance to the issue raised in the Rule 7 notice.

[7] Ms Oosthuizen submitted that the court may permit the Respondent to file supplementary papers responding to the assertions in the said paragraphs. As things stand, the contents of these paragraphs are assertions extraneous to the issue under consideration, and the Respondent does not have to incur the costs of drafting a response

to assertions with no bearing on the issue under consideration. Thus, in my view, the said paragraphs should be disregarded. I am satisfied that the Respondent will suffer prejudice if the striking out application were to be refused. Accordingly, the argument proffered by the Applicant in response to the striking out application is unsustainable. Therefore, the application to strike out must succeed.

APPLICANT'S AUTHORITY TO INSTITUTE PROCEEDINGS

[8] I now turn to the issues raised in the Rule 7 notice. In the preceding discussion, I have alluded to the contentious issues surrounding the Applicant's authority in initiating the main application, as well as Mr De Jager's authority to represent the Applicant as an attorney in the context of the striking out application. The court's evaluation of Mr De Jager's authority as the Applicant's attorney will fundamentally depend on the Applicant's authorisation to commence these proceedings. Simply put, the answer to the Applicant's authority to institute these proceedings will be the determining factor in the court's consideration of Mr De Jager's authority as the Applicant's attorney.

[9] The Respondent contends that the Applicant is incapacitated by virtue of the death of its sole shareholder and director, Mr Haarhoff. The Respondent further asserts that the Applicant's Memorandum of Incorporation and Mr Haarhoff's last will and testament are silent regarding the appointment of a director under the circumstances. According to the Memorandum of Incorporation, the director of the Applicant must also be a shareholder. In this instance, Mr Haarhofff's shareholding vests in the deceased estate, the

Respondent contends, thus Mr De Jager's appointment as director could not have been valid.

[10] Mr De Jager, in his supplementary affidavit, responding to the Rule 7 Notice, contends that the authority is derived from clause 4.8 of the Memorandum of Incorporation which regulates amongst other things what should happen upon a shareholder's death. The Applicant contends further that the clause envisages that the deceased shareholder is deemed to have made an offer for the sale of her or his shares to the other shareholders of the Applicant. Furthermore, the Applicant contends that clause 4.8.3.8 of the Memorandum of Incorporation, which provides that the executor of the deceased shareholder's estate shall manage those shares in the ordinary course of business. Based on the provisions of the aforementioned clauses, as the executor of the deceased estate of Mr Haarhoff the sole shareholder of the Applicant, Mr De Jager, was appointed as the sole director and shareholder. In essence, he stepped into the shoes of the deceased shareholder. The Applicant averred, that for that reason, Mr De Jager complies with the definition of the shareholder as contained in the Memorandum of Incorporation. The relevant parts of the affidavit read:

> **"7. A shareholder is defined in the MOI, inter alia as a person complying with the definition thereof as contained in the Companies Act, 2008 ("the Act") and, more specifically, sections 1 and 57(1) thereof (clause 1.30 of annexure "B")**
> **8. According to section 57(1) of the Act, a shareholder*: "includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached."***

[11] The Respondent contends that Mr De Jager was advised that in his capacity as executor of the estate he was unable to issue shares to himself nor exercise any shareholders' voting rights. A copy of the Applicant's Memorandum of Incorporation was made available to him, and was directed to clauses that prohibited the transfer of shares and his directorship. According to Respondent Mr De Jager in his correspondence dated 02 February 2024 in response to the Respondent, only took exception to the contents of the letter, in his capacity as executor and director of Applicant and did not raise the issue of his interpretation of the Memorandum of Incorporation, and belatedly raises it. Concernedly, Respondent avers that the letter from Meridian Accountants, dated 01 February 2024, annexed to the above mentioned correspondence, reflects Mr Haarhoff's shareholding in the Applicant as the minority shareholding of 49% and the majority shareholding of 51% vests in Tolhof Empowerment NPC. The Respondent avers that this would mean that at the time Mr De Jager appointed himself as a director, he laboured under the impression that Mr Haaarhoff was only a minority shareholder and did not consult with the other shareholder. It is contended by Respondent that Mr Haarhoff was not a minority shareholder. Respondent further asserts that Mr Hughes serves as the Director of Tolhof Empowerment NPC. The latter is the entity which had the option of taking up the majority shareholding in Applicant which it never exercised, within the period of three years permitted in terms of the Share Option Agreement concluded on 29 July 2019 by Applicant and Tolhoff Empowerment NPC.

[12] According to the Respondent, in the ordinary cause of business, would imply the disposal of the shares, which in this instance refer to transferring them to the designated beneficiary, Ms Sutherland, in terms of the last will and testament of Mr Haarhoff. The

executor should not be interpreted as the holder of shares and the possessor of voting rights, so the argument goes.

[13] The Respondent contends that the Memorandum of Incorporation does not make provision for transfer of shares, it provides that a shareholder of the Applicant must also be a director. According to Mr De Jager's own version he is not a shareholder and therefore cannot serve as a director. Respondent further posits that Mr De Jager fails to provide the documents that were submitted to CIPC for his appointment as director, instead he only annexes the COR39 confirming his appointment. The aforementioned document would include the shareholding resolution pertaining to change in directorship, as well as the minutes of the meeting at which the decision was taken. In his response to the Rule 7 Notice, Mr De Jager, notably fails to address the authority of his Firm of Attorneys to act on behalf of the Applicant.

[14] The Respondent claims in the supplementary affidavit, that Mr De Jager's appointment as director of the Applicant lacked legal validity. It is contended that the Applicant is an incapacitated company as a consequence of the death of its sole shareholder and director, and therefore not authorised to conduct any litigation. Consequently, Mr De Jager is not authorised to act as legal representative of the Applicant.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[15] The primary reason for the requirement of a power of attorney in Rule 7(1), is to establish an attorney's mandate in the proceedings concerned and stave off repudiation of the process by the representee, on the basis that no authority was given to the person who purported to act on behalf of the representee at a later stage. It is meant to avert persons instituting actions in the name of others when unauthorised to do so. *Public Protector of South Africa v Speaker of the National Assembly and Others* [2022] 4 All SA 417 (WCC) paragraph 47. *Erasmus Superior Court Practice Rule 7 Commentary D1-93.* Rule 7 (1) states:

> **"Subject to the provisions of subrule (2) and(3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."**

In his last will and testament, Mr Haarhoff designated two co-executors to manage the administration of his estate. Following his passing, Mr De Jager was designated in this capacity as executor by the Master of the High Court. In these proceedings, that would be the role he should assume.

[16] The will and the Memorandum of Incorporation do not envisage a situation where the director is not a shareholder of the Applicant in this matter. It is so that Mr De Jager was registered as a director of the Applicant which is incongruous to the Memorandum of Incorporation of the Applicant.

[17] Mr McChesney aptly argued that directors are appointed by shareholders, and upon death of the sole shareholder, the directorship is terminated as envisaged in the Companies Act read with the Memorandum of Incorporation. Crucially, counsel contends that the Memorandum of Incorporation must explicitly provide for the appointment of an executor, in his *nominee officio* capacity to be appointed as a director and reflected as a shareholder. In this regard reliance is placed on *Ellis v Saga Wine Farms (Pty) Ltd* and Others [2014] ZAWCHC 48 paragraph 10, where it was stated:

> *"...This evidences the failure on the part of the Applicant to appreciate the manner in which the affairs of a company are conducted . . . It does appear that the Applicant overlooks the fact that the Executor or Interim Curator (once appointed) will be recognized as the shareholder, and will appoint a director or directors of a company in terms of the Companies Act, 2008 and the Articles and Memorandum of Association of the company."*

[18] While on the other hand, Ms Oosthuizen contends that reliance by the Respondents on the *Ellis* case sought to fortify the proposition that, the only manner in which an executor can be appointed as a director of a company under these circumstances, is if the Memorandum of Incorporation of the company explicitly allows for

the appointment in their *nominee officio* capacity or acknowledge them as a shareholder. However, counsel argues that, this was not the court's finding in *Ellis*.

[19] In *Ellis*, the financial manager of Saga sought leave for the appointment as an interim receiver prior to the appointment of the executors. The court deemed this to be objectionable, as this would confer power to the financial manager to conduct the affairs of the company and administer the deceased's estate without the Master's supervision. It is further averred by Ms Oosthuizen that, although the company's Memorandum of Incorporation, in *Ellis* expressly made specific provision for the executor to be entered into the register of members of the company *nominee officii*, the court did not find that this was the only manner in which an executor could be appointed as a director or regarded as a shareholder of a company in a deceased estate. Applicant placed reliance on *Clarkson NO v Gelb* 1981(1) SA 288 (W) at 290 E-H, where the Master appointed the attorney of the Plaintiff the executor of the deceased estate, who was subsequently appointed as director to allow him to participate in the company's resolution.

[20] Mr McChesney argued that, it was not their contention that an executor cannot be appointed as director, they maintain that such provision must be included in the Memorandum of Incorporation. It bears emphasis at this point that the facts in *Clarkson* remain distinguishable to the situation in *casu*, in that in *Clarkson* the Company had two shareholders and upon the death of the deceased, the company had only one shareholder remaining. In essence, the death of one shareholder did not render the company incapacitated in that case. Importantly, in *Clarkson,* it is noteworthy that the executor did not appoint himself as the director, as there was a remaining shareholder.

In contrast, in *Ellis* a financial manager of the company sought leave of this court to be appointed as receiver of the company prior to the appointment of the executors, in *casu* the executor participated in his appointment as director without judicial oversight. Essentially Mr De Jager appointed himself as director of Applicant.

[21] Mr. McChesney referred the court to a precedent that showcases the situation in other jurisdictions, specifically the case of *Kings Court Trust Ltd and others v Lancashire Cleaning Services Ltd* [2017] EWHC 1094 (CH). I find that the issues the court considered in that case are relevant to the Applicant's situation, as it involved a sole director and sole shareholder who had passed away. In *Kings Court Trust* the court was presented with a question as to whether it possessed the authority under section 125 of the 2006 Act, to rectify the register. This situation arose when the co-executors and trustees of the estate of the Respondents were faced with frozen bank accounts rendering them unable to pay wages and creditors. They then sought an urgent application to appoint a director to take control of the company.

[22] The court determined that it was justified under section 125 of the 2006 Act to grant the order sought, based on the urgency of the situation. Accordingly, the court granted an order to amend the Company Register to reflect the names of the executors as shareholders, allowing them to pass a resolution as shareholders to appoint a new director. Significantly, the court emphasised that these circumstances were exceptional, the company was left without a director upon death of the sole shareholder, and cautioned that this recourse would not be available to companies that still have shareholders and directors able to act. The court remarked that there is no authority, without the intervention

of the court to enter the executors in the Company Register or for any directors to be appointed to replace the now deceased director.

[23] It is evident that Mr De Jager and Mr Claasen, in their roles as executors of the deceased estate, lack the authority to act as shareholders in their personal capacity or as executors without explicit provisions outlined in the Memorandum of Incorporation, when considered alongside the Companies Act, 2008. They cannot pass resolutions to appoint one of themselves as a director of the Applicant in his personal capacity, even in his capacity as *nominee officio* of the deceased estate of Mr Haarhoff without court intervention.

[24] In my view, the ownership or dominium of the Applicant's shares vests in Mr Haaroff's deceased estate. At the risk of repetition Clause 4.8.3.8 of the Memorandum of Incorporation envisages that in circumstances where a shareholder is deceased the securities of such a shareholder would be available to the remaining shareholders to exercise the option to acquire the securities within a prescribed period. Where such securities are free from the said option same shall be dealt with by the executor in the normal course of business, but subject to the discretion of the Board. In this instance the sole director's death meant that the Board ceased to exist and thus the afore stated clause could not have been implemented in the circumstances.

[25] Section 61(1) of the Companies Act 71, 2008 envisages that a shareholder's meeting would be called by the Board of the Company. Similarly, section 70(4) of the Companies Act contemplates that where there are no remaining directors of a company,

any holder of voting rights is entitled to exercise those rights in a meeting for the election of a director for purposes of replacing a member of the Board. A shareholders' meeting according to the Companies Act is a meeting held by the holders of the company's securities who are entitled to exercise voting rights in relation to the matter which is the subject of the meeting. According to section 1 of the Companies Act voting rights is defined as follows:

> **" 'voting rights', with respect to any matter to be decided by the company, means-**
> **(a) The rights of any holder of the company's securities to vote in connection with that matter, in the case of a profit company; or**
> **(b) The rights of a member to vote in connection with the matter, in the case of a non profit company."**

It is important to note that the Applicant had no board of directors, which according to clause 4.6.1 of the Memorandum of Incorporation requires that any disposal of or transfer of securities should be with prior approval of the Board.

[26] Both Mr De Jager and Mr Claasen are not holders of securities of the Applicant and thus not authorised to act as if they are. Similarly, it is abundantly clear that no voting rights were conferred to the co-executors enabling them to convene a shareholders' meeting on 30 June 2022. Demonstrably, there is no sound basis established upon which Mr De Jager and Mr Claasen as co- executors derive the power to convene a shareholders meeting when at that stage the Applicant had no shareholders. Guided by the Constitutional imperatives set forth in section 233 of the Constitution that every court must prefer any reasonable interpretation of the legislation that is consistent with

international law over any alternative interpretation that is inconsistent with international law, I find *Kings Court Trust* instructive and apposite to the present matter. For we have established that in other jurisdictions in exceptional circumstances such as *in casu* the executors to a deceased estate, in the absence of shareholders, had no power to take any resolution to appoint a director, that authority vests with the court.

[27] Ostensibly, from the Memorandum of Incorporation, Mr De Jager's contention does not find favour at all, I say this because even as an executor of the deceased estate, his directorship would be precluded by clause 7.1.5 of the Memorandum of Incorporation which stipulates:

> **"Subject to the Act (inter alia sections 69 and 71 thereof) any contrary provision in this Memorandum, each director of the company shall serve as such for an indefinite term unless appointed for a specific term."**

[28] Concomitantly, the relevant parts of the minutes and the resolution taken at the shareholders meeting on 30 June 2022 read:

> **"9. The shareholders voted unanimously that Jonathan Fabian de Jager be and is hearby authorised to sign all such documentation and do all such things as may be necessary for or incidental to the appointment of Jonathan Fabian de Jager as director and removal of the late Henning Petrus Cornelius Haarhoff as director."**

[29] Evidently, no specific term is provided for in Mr De Jager's directorship which means Mr De Jager is appointed director of the Applicant for an indefinite term. I am thus,

unable to reason how an executor of a deceased estate could be appointed a director in a company indefinitely as the mandate of an executor is not in its nature intended to continue over an indeterminate or unlimited duration. In my view, this is an indication that there was no prior consideration of the Memorandum of Incorporation when the co-executors of Mr Haarhoff's deceased estate convened the extraordinary Shareholders' meeting on 30 June 2022.

[30] It is also clear from the case law that in circumstances such as these that befell the Applicant, the business of the company will only be conducted as guided by the provisions of the Companies Act and the Memorandum of incorporation. Dlodlo J, in *Ellis* dealing with circumstances akin to these in the instant matter observed as follows:

> *"[7] The corporate governance and business of a company is conducted pursuant to the provisions of the Companies Act, 2008, together with the Memorandum and Articles of Association of the company. The Memorandum and Articles of Association stipulate how the company is to be governed and matters related thereto. The Companies Act, 2008, makes provision; inter alia, for fiduciary duties and obligations of Directors of a company; has provisions protecting against the reckless conduct of the business of a company (which would include borrowing money) and provides for personal liability of directors to creditors in certain circumstances; and further provides for responsibilities of the accounting officers of the company.*

[8] The problem with the relief sought by the Applicant is that it seeks to give him (and he is neither a shareholder nor a Director of the company) the power to conduct the affairs of the company:

(a) Without regard for the provisions of the Companies Act, 2008 or Articles and Memorandum of Association of the company; (b) In a manner not provided for as envisaged in either the Companies Act, 2008 or the Articles and Memorandum of Association of the company; (c) Without the Applicant being a director of the company; (d) Without regard for the rights of the shareholder of the company , which is the deceased estate of the late Roza and in whose deceased estate dominium in respect of the shares of the shares of the company vests."

[31] The approach taken by the executors of Mr Haarhoff's deceased estate in interpreting the Memorandum of Incorporation of the Applicant leading to designating Mr De Jager as the sole director of the Applicant in this context leads to insensible and un-businesslike results. *(Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18). In my view, it has the potential of undermining and compromising the purpose of corporate governance. Therefore, it cannot be argued that Mr De Jager disposed with the shares in the normal course of business as envisaged in clause 4.8.3.8 of the Memorandum of Incorporation.

[32] It can be inferred from *Kings Court Trust Limited,* that in circumstances where the company is incapacitated due to the death of the sole director and shareholder, the authority for any director to be appointed replacing the now deceased sole shareholder and director, vests with the court. In his founding affidavit, Mr. De Jager concedes that

the shareholding in Applicant remained in Mr Haarhoff's deceased estate. Notwithstanding that, he disputes this in reply, asserting that the dominium in the shares and voting rights vest with him until same are transferred to Mrs Sutherland. I agree with the Respondent that Mr De Jager as an executor of Mr Haarhoff's deceased estate, the only manner for him to deal with shares of the deceased estate is in terms of Mr Haarhoff's last will and testament.

[33] For all the reasons advanced above, I am not satisfied that the Applicant had authority to institute the proceedings as an incapacitated company. It follows therefore that no authority existed to appoint De Jagers Attorneys to act on the Applicant's behalf.

COSTS

[34] Lastly, in respect of costs, the Respondent avers that since Mr De Jager on diverse occasions received warnings prior to instituting these proceedings, to which he paid no heed. Correspondence was directed to Mr De Jager as alluded in paragraph 11 of the judgment, precisely on 05 March 2024 alerting him that his directorship in the Applicant is being called to question or challenged by the Respondent. The reasons for the challenge with reference to the Applicant's Memorandum of Incorporation were explicitly detailed. Mr De Jager's attention was specifically drawn to the Share Option Agreement entered into between Mr Haarhoff, Applicant and Tolhof Empowerment NPCS NPC as alluded in paragraph 11 of this judgment. Based on that, there is no reason that the Applicant should be mulcted with costs of these proceedings. The Respondent thus argued that Mr De Jager must pay the costs. The general rule is that the successful party

is awarded costs. Costs are for the court's discretion. Smalberger, JA in *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) 25, dealing with the issue of discretion remarked as follows:

> *"The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party costs, or a portion thereof, or order lesser costs than it might otherwise have done…"*

[35] It would be remiss of this court after examination and consideration of the nature of the litigation and Mr De Jager's conduct in this matter not to grant an appropriate cost order against Mr De Jager duly sought by the Respondent.

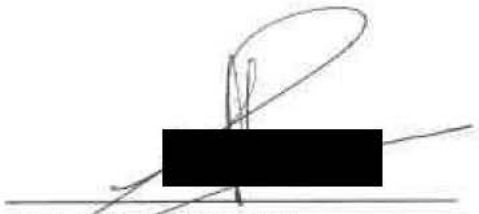
ORDER

[36] In the result, I make the following order:

36.1 Paragraphs 8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25 and 38 of the Applicant's replying affidavit are struck out.

36.2 The Respondent's Rule 7 objection is upheld.

36.3 Mr De Jager is to pay the costs of the application for striking out and the Rule 7 application such costs to include costs of counsel on scale B.



Judge N.E. Ralarala
Judge of the High Court

APPEARANCES

For the Applicant:

A Oosthuizen instructed by De Jager & Associates

For the Respondent:

M A McChesney instructed by Bailey at Law Attorneys