IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE No: 12000/2024

In the matter between:

JANINE ARMER	Applicant
and	
PIETER ROY NAUDÉ	Respondent

Heard: 3 February 2026

Judgment: 4 February 2026

Summary: Application for leave to appeal: Contempt of Court; joinder of necessity and effect on order of court; rescission of order granted by agreement; variation of an interim order of court.

ORDER

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1. The application for leave to appeal is dismissed with costs, with scale B applying.

2. The order of this court handed down on 1 December 2025 in the above matter is varied to include:
   2.1. A new paragraph 18 which reads as follows: "The application for rescission of the order of this court under the above case number on 31 May 2024 is dismissed."
   2.2. A new paragraph 19 which reads as follows: "Save to the extent of the aspects in respect of which the relief sought therein was incorporated in the above paragraphs of this order, the counter-application is dismissed."

JUDGMENT

Handed down by email to the parties on 4 February 2026

Judgment handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII.

KANTOR, AJ:

1. Judgment was handed down and an Order was granted in the above matter on 1 December 2025 ("the Judgment" and "the Order"). The respondent delivered an application for leave to appeal by email on 22 December 2025. The application for leave to appeal was heard on 3 February 2026.

2. The definitions employed in the Judgment and the Order will be employed in this judgment.

3. The grounds of substance in the application for leave to appeal are quoted *verbatim* and considered briefly below.

4. Before doing so, there is another aspect requiring attention which occurred to me in preparing for the hearing of this application. It was recorded in paragraph 58 of the Judgment that "The application for rescission of the 31 May Order therefore fails." but the Order did not include that the application for rescission was dismissed. Similarly, the counter application was not successful but the Order did not specifically record that it was dismissed, save to the extent of the aspects in respect of which the relief sought therein was incorporated in the Order. Paragraph 12 and paragraph 1.5 of the application for leave to appeal reveal that the respondent was also of the view that the counter-application was dismissed, the first line of the former reading "The Court erred in dismissing the counter application ..." These were due to an error/omission on my part, occasioned by oversight on my part. I raised these two aspects with the parties at the hearing of the application for leave to appeal. They both agreed that the Order should be varied in terms of Rule 42(1)(b) to include paragraphs to the above effect. In my view this is an appropriate situation for my error/oversight to be corrected in terms of Rule 42(1)(b) by the variation of the Order to include:

   4.1. A new paragraph 18 which reads as follows: "The application for rescission of the order of this court under the above case number on 31 May 2024 is dismissed"

   4.2. A new paragraph 19 which reads as follows: "Save to the extent of the aspects in respect of which the relief sought therein was incorporated in the above paragraphs of this order, the counter-application is dismissed."

5. It appeared from paragraph 1 of the application for leave to appeal that there was an error in the reference to paragraphs of the Order against which leave to appeal would be sought. For example, paragraph 17 was not included, which was the costs order. Mr Dunn, who appeared for the respondent, confirmed that there was an error and after considering the paragraphs of the Order confirmed that leave to appeal was sought only against paragraphs 1 to 9 and 17 to 19 thereof (i.e. including the new paragraphs 18 and 19 referred to above).

6. The grounds of the application for leave to appeal will now be considered.

"A. MISDIRECTION AS TO THE NATURE OF THE ORDERS - INTERIM IN FORM BUT FINAL IN EFFECT

3. The Court erred by granting orders that are characterised as interim but are, by reason of their nature and effect, final orders that cause immediate and irreversible prejudice to the Respondent/Counter-Applicant, in particular:

3.1. Paragraph 1 (Declaration of contempt) is a final declaratory order that brands the Respondent/Counter-Applicant as a contemnor of court. This declaration cannot be "undone" even if the appeal succeeds, as the stigma and consequences of the contempt finding are immediate and permanent;

3.2. Paragraph 2 (Leave to set down for sanction) creates a procedural "contempt trap" whereby the simple fact of non-compliance with any aspect of the order (including impossible compliance with payment obligations) automatically entitles the Applicant to bring the Respondent/Counter-Applicant before the Court for sanction. The order expressly states that "by 'not comply' is not meant to 'be in contempt'" - meaning mere non-compliance, regardless of reason or ability, triggers the right to seek imprisonment;

3.3. Paragraph 3 (Sole authority to Applicant) immediately dispossesses the Respondent/Counter-Applicant of control over businesses he built over approximately 30 years. Although framed as interim relief "pending the final determination of the action", the practical effect is immediate and complete transfer of control which cannot practically be reversed;

3.4. Paragraph 6 (Payment of R686,572.54 within 7 days) is in substance a final money judgment that was granted without any inquiry into the Respondent/Counter-Applicant's ability to pay, and which requires immediate execution. The consequences of non-payment are severe (imprisonment) yet no opportunity was afforded to demonstrate financial impossibility;

3.5. Paragraph 8 (Hand over keys and interdict from properties) immediately dispossesses the Respondent/Counter-Applicant from properties where he resides and has resided for many years, effectively operating as an eviction order without following PIE procedures;

3.6. Paragraph 11 (Dismissal of counter application) is a final order refusing the Respondent/Counter-Applicant's substantive relief; and

3.7. Paragraph 17 (Costs on Scale C) is a final punitive costs order that must be paid regardless of the outcome of the main action."

7. Paragraph 3.1: It is correct that the contempt finding in paragraph 1 of the Order is final. It was not intended to be, and could not be, anything besides final, as appears from the Judgment. It related to the non-compliance with the 31 May Order dealt with in the Judgment. This does not ground a basis for leave to appeal to be granted.

8. Paragraph 3.2: Paragraph 2 of the Order is plain: sanction for contempt of the 31 May Order was only to be considered if the Order was not complied with. The right to seek a sanction was already there. The Order afforded the respondent a reprieve in this regard, provided that he complied with the terms thereof. This was not a contempt trap. Contempt had already been found and sanction could have been determined, but instead of doing that paragraph 3 of the Order deferred that aspect, which was in the respondent's favour. This does not ground a basis for leave to appeal to be granted.

9. Paragraph 3.3: Control of a company can be reversed. This does not ground a basis for leave to appeal to be granted.

10. Paragraph 3.4: The Judgment (for example, paragraphs 80, 85 and 111) dealt in detail with the facts which established that the respondent had diverted between R2 589 707.68 as at the end of June 2025, increasing to R3 165 409.95 in November 2025, of funds of certain entities whose bond liabilities had not been paid. These were funds which had been directed in the Order to be paid into specific bank accounts of specific entities which was ignored by the respondent. The respondent did not disclose what had happened to these diverted funds and where they were held. Paragraph 6 of

the Order reads: "The respondent is directed, within 7 (seven) days from the date of this order, to cause the following amounts in respect of the following properties to be paid into the bank accounts as indicated …" No question of ability to pay arose and the order was for the respondent to "*cause the following amounts*" to be paid in the aforesaid context. The consequence of non-payment is contended by the respondent to be imprisonment. This is not the case (1) in the absence of contempt of court being established and even then it would be for the court hearing that matter to determine that aspect in the exercise of its discretion or (2) the respondent not causing such payment to be made and then the sanction is not for the failure to make that payment but for having been in contempt of the 31 May Order. This does not ground a basis for leave to appeal to be granted.

11. Paragraph 3.5: The question of the applicability of PIE was never an issue in the matter. This does not ground a basis for leave to appeal to be granted.

12. Paragraph 3.6: The rescission of judgment sought in the counter application was not granted. That is final and leave to appeal can be sought in respect thereof. The balance of the counter application was for relief pending the determination of the action. It is not final relief. This does not ground a basis for leave to appeal to be granted.

13. Paragraph 3.7: Costs awarded on scale C is not a punitive costs order. Scale A, B or C in terms Rule 67A relate to the complexity and importance of the matter (*Mashavha v Enaex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ) at paragraph 19). The contempt relief granted was final as was the failure of the application for rescission of judgment, both decided in favour of the applicant. The interim relief was also decided in her favour in the main. This does not ground a basis for leave to appeal to be granted.

"B. CRITICAL MISDIRECTION REGARDING PARAGRAPH 6 - THE PAYMENT ORDER

4. The Court committed a fundamental misdirection in granting an order directing payment of R686,572.54 within seven days without conducting any inquiry into the Respondent/Counter-Applicant's ability to comply:

4.1. No evidence was led, nor any inquiry conducted, as to whether the Respondent/Counter-Applicant has the financial means to make such payment within the timeframe specified;

4.2. The Respondent/Counter-Applicant's bank accounts (as at 16 December 2025) reflect total available funds of less than R100,000.00, which is manifestly insufficient to comply with an order to pay R686,572.54;

4.3. The Respondent/Counter-Applicant's monthly expenses and debit order obligations amount to approximately R467,392.73, leaving him with no surplus funds;

4.4. The law is clear that a person cannot be imprisoned for failing to do that which is genuinely impossible (see Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)); and

4.5. The combination of Paragraphs 2 and 6 creates an unconscionable situation where the Respondent/Counter-Applicant faces imprisonment for non-compliance with a payment order that he cannot possibly satisfy, regardless of his willingness to comply."

5. It is submitted that another Court would find that an order requiring payment of a substantial sum within seven days, combined with a mechanism for imprisonment upon non-compliance, cannot lawfully be granted without first establishing that the debtor has the means to comply. The failure to conduct such an inquiry renders the order fundamentally flawed."

14. This has been dealt with in paragraphs 8 and 10 above and in my view does not ground a basis for leave to appeal to be granted.

"FUNDAMENTAL MISDIRECTION ON NON-JOINDER OF CORPORATE ENTITIES

Misapplication of the Principles Governing Non-Joinder

6. The Court erred in its application of the established principles governing non-joinder by:

6.1. Failing to properly apply the test for joinder of necessity as set out in Gordon v Department of Health: KwaZulu-Natal 2008 (6) SA 522 (SCA), which requires that a party must be joined if it has a direct and substantial interest in the subject matter that may be affected prejudicially by the court's judgment;

6.2. Incorrectly finding at paragraphs 33-34 that, even if joinder was necessary, the circumstances of the matter did not require the joinder of the corporate entities, when the Court purported to grant relief directly affecting the rights, assets, and management of those entities;

6.3. Erroneously concluding at paragraphs 36-38 that the relief sought does not determine rights in respect of assets belonging to the companies, when the order granted sole authority over "all immovable property owned by such entities" and "any associated operational activities";

6.4. Failing to apply the principle in Matihabeng Local Municipality v Eskom Holdings Limited 2018 (1) SA 1 (CC) that no court can make findings adverse to any person's interests without that person first being a party to the proceedings.

Failure to Recognise the Separate Legal Personality of Corporate Entities

7. The Court erred by:

7.1. Disregarding the principle enshrined in section 19 of the Companies Act 71 of 2008 that companies enjoy separate legal personality distinct from their directors and shareholders;

7.2. Making far-reaching orders affecting the management, control, and assets of corporate entities (ACP Metals (Pty) Ltd, IPJA Investments (Pty) Ltd, Forestriver (Pty) Ltd, Mufasa Global Management Enterprises (Pty) Ltd, Little Dinkum (Pty) Ltd, and the trusts) without those entities being joined as parties;

7.3. Failing to recognise that the Applicant had not sought relief to pierce the corporate veil, and absent such relief, the separate legal personality of these entities had to be respected.

7.4. Essentially joining entities to the proceedings in circumstances where no application existed for them to be joined."

15. This does not deal with the reasoning in the Judgment as to why non-joinder should not prevent the relief (including that the parties were the sole directors of each of the corporate entities involved) and ignores paragraph 14 of the Order which prevents any of the assets being dealt with other than in the ordinary course of the business of the relevant entities. The respondent, in his application for leave to appeal, inconsistently does not comment on the entities which he was to control, as sole director, in terms of the Order.

16. The question of joinder is dealt with in copious detail in paragraphs 20 to 57 of the Judgment. No basis was proffered for the reasoning and conclusions dealt with therein to be wrong.

17. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"MISDIRECTION ON THE CONTEMPT FINDINGS

Failure to Apply the Correct Legal Test for Civil Contempt

8. *The Court erred in finding the Respondent/Counter-Applicant in contempt by:*

   8.1. *Failing to properly apply the requirements for civil contempt, namely that the breach must be wilful and in bad faith (mala fides), beyond a reasonable doubt, as established in Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA), Matjhabeng Local Municipality, and R v R (CCT 337/21) [2023] ZACC 5; 2023 (9) BCLR 1126 (CC) (1 February 2023).*

   8.2. *Rejecting the Respondent/Counter-Applicant's defence that his conduct was lawful, justified and taken in good faith to protect legitimate business interests and prevent business collapse;*

   8.3. *Failing to accord sufficient weight to the Respondent/Counter-Applicant's evidence that the Applicant's own breaches of the 31 May Order and mismanagement of the business necessitated his protective actions;*

   8.4. *Incorrectly finding that the standard of proof was met when there was a genuine dispute as to whether the Respondent/Counter-Applicant's conduct was in wilful defiance of the order or was rather a reasonable interpretation thereof and/or a justified response to the Applicant's own conduct.*

Erroneous Interpretation of the 31 May Order

9. *The Court erred in its interpretation of the 31 May Order by:*

   9.1. *Finding at paragraphs 72-84 that paragraph 3 of the 31 May Order was breached when the Respondent/Counter-Applicant's conduct was consistent with a reasonable interpretation that the order regulated existing operations and did not prohibit all business development and adaptation necessary for survival;*

   9.2. *Failing to consider that the creation of new business listings and systems was operationally necessary in circumstances where the Applicant had rendered the existing mechanisms unworkable through her own conduct;*

   9.3. *Not adequately considering the context and purpose of the 31 May Order, which was to preserve the status quo pending determination of the universal partnership action, and whether the Respondent/Counter-Applicant's actions were consistent with that purpose."*

18. The test for contempt and *<u>Fakie</u>* were dealt with in detail in the Judgment.

19. The application for leave to appeal ignores the copious detail in the Judgment (for example, paragraphs 72 to 102, 108 to 119 and 121) dealing with serial and objective non-compliance with the Order by the respondent, such as the diversion of funds to the extensive degree referred to above and causing them not to be paid into the bank accounts specifically and unambiguously directed in the 31 May Order, the ignoring of the directions of Mr Shaw and the self-servingly selective paying of the bond liabilities

only in respect of the respondent's entities (as defined in the Order) and none in respect of the applicant's entities (as defined in the Order).

20. The respondent's conduct was akin to that of the dishonest waiter whose protests as to error fall flat when his errors always result in the customer being short-changed and never receiving too much change.

21. As stated in paragraph 111 of the Judgment:

> "This, however, in my view, cannot pass muster on the facts of the matter, including those considered in detail in the above two sections: (1) The bonds on the properties owned by the entities of which the applicant is the sole shareholder and director were not paid while the bonds on the properties owned by the entities of which the respondent is the sole director or trustee were paid: no explanation for this transparently convenient divide was attempted. (2) The respondent caused R741 448 to be paid to himself in respect of a loan which he claimed was owed to him by Hairbay. (3) The systematic diversion of income. (4) The payments in breach of paragraph 11.1 of the 31 May Order. All of the above being despite the regular written protest of the applicant."

22. The unambiguous provisions of the Order and these acts in serial and objective non-compliance with the Order, to an extensive degree and in the face of protest, wholly undermined any claims as to aspects such as necessity and any alleged interpretations of the Order.

23. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"MISDIRECTION ON THE RESCISSION APPLICATION

Incorrect Exercise of Discretion

10. The Court erred in its treatment of the rescission application by:

10.1. Finding at paragraph 52 that, even if there was a non-joinder, the appropriate approach was to exercise the discretion against rescission, when the fundamental defect of non-joinder rendered the original order ineffective against the corporate entities;

10.2 Failing to consider the Respondent/Counter-Applicant's reliance on Rule 42(1)(c) that there was a mistake common to the parties in agreeing to an order which was bad in law and unenforceable against the actual parties it concerned;

10.3 Creating a circular argument at paragraph 50 that if the non-joinder point is good, the rescission application fails for lack of notice to the corporate entities, while if the non-joinder point is not good, then the rescission application fails for lack of a legal basis, when the logical consequence should have been to rescind the order and require proper joinder."

24. The respondent ignores the factors dealt with in the Judgment in respect of the exercise of the discretion to refuse the application for rescission, such as that one or the other of the parties was the sole director of each of the corporate entities.

25. The question of joinder has been dealt with above and is dealt with in copious detail in paragraphs 20 to 57 of the Judgment. No basis was proffered for the reasoning and conclusions dealt with therein to be wrong.

26. Whether an argument is circular or not is of no moment – the fact is that Rule 42(3) requires a joinder of any interested parties and, therefore, if the corporate entities were interested parties, they were not joined and the rescission would fail.

27. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"MISDIRECTION ON THE VARIATION OF THE ORDER

Failure to Grant Appropriate Relief

11. The Court erred in granting the Applicant sole authority over all entities by:

11.1. Accepting at paragraph 124 that a new mechanism was needed because the 31 May Order had failed, but then failing to properly consider the counter application's proposal for control to be granted to the Respondent/Counter-Applicant, who established, funded and successfully operated these businesses for decades;

11.2. Failing to give adequate weight to the evidence that the Applicant's mismanagement, not the Respondent/Counter-Applicant's conduct, caused the failure of the shared control mechanism;

11.3. Not properly considering that the Applicant was never more than an employee in the business and that her alleged partnership claim remains disputed in the pending action under case number 16605/2024;

11.4. Granting interim relief that effectively determines the ultimate relief sought in the pending action, thereby prejudging the merits of the universal partnership claim."

28. The Order did not grant control of all of the entities to the applicant: various entities were ordered to be under the control of the respondent (paragraph 4 of the Order). This was in the context of the mechanism of shared control in the 31 May Order having failed and it being common cause that a new mechanism was required. The respondent's proposal was for the shared control to be replaced with his sole control. Bearing in mind the findings in the Judgment, such as his contempt and diversion of funds, this was plainly not a feasible proposal.

29. The questions of alleged mismanagement and the applicant's alleged status as an employee were considered directly in the Judgment (such as paragraph 129). For example, the fact that the applicant stood surety for R10.5 million of debt of the entities of which she is the sole director and shareholder militates against the respondent's allegations, as well as the extensive diversion of funds by the respondent and the selective failure to pay bond liabilities, all in breach of the 31 May Order.

30. The relief in the Order does not determine the ultimate relief sought in the pending action. For example, the assets of the various entities were not to be dealt with in any way (paragraph 14 of the Order). The relief is interim pending the action and expressly recorded in paragraph 16 of the Order to be subject to variation by this court.

31. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"MISDIRECTION IN DISMISSING THE COUNTER APPLICATION

12. The Court erred in dismissing the counter application by:

12.1. Failing to properly weigh the competing applications when both parties acknowledged that the existing mechanism had failed and both sought a replacement mechanism;

12.2. Not giving adequate consideration to the Respondent/Counter-Applicant's evidence that he established, funded and operated the businesses for approximately 30 years;

12.3. Failing to properly consider the Respondent/Counter-Applicant's evidence regarding the Applicant's own breaches of the 31 May Order and the principle that she who comes to equity must come with clean hands;

12.4. Not properly considering the alternative relief sought, including the proposal for a forensic audit to resolve the disputed financial issues."

32. It was common cause that the shared management mechanism in the 31 May Order had failed.

33. The evidence established plainly and unequivocally conduct on the part of the respondent in blatant disregard of that mechanism. As mentioned above, this included the diversion of funds to an extensive degree and causing them not to be paid into the bank accounts specifically and unambiguously directed in the 31 May Order, the ignoring of the directions of Mr Shaw and the self-servingly selective paying of the bond liabilities only in respect of the respondent's entities (as defined in the Order) and none in respect of the applicant's entities (as defined in the Order). Again, the respondent's conduct was akin to that of the dishonest waiter whose protests as to error fall flat when his errors always result in the customer being short-changed and never receiving too much change.

34. On the other hand, the respondent's recurring allegations as to mismanagement by the applicant were not supported by any hard facts and were conclusions unsupported by any substantial evidence. Similarly, his recurring allegations as to the applicant being merely an employee with no contribution to the business was not supported by hard facts and evidence, including those referred to above that she was the sole shareholder and director of the applicant's entities and had stood surety for their debts in the amount of R10.5 million.

35. As to the alternative relief sought in the counter application, which was to place the respondent in full control of each and every entity in the business, this would simply exacerbate the situation and would have put the fox in full control of the henhouse which in my view would have been most inappropriate in the circumstances.

36. On the other hand, varying the control from the shared basis in the 31 May Order to the split basis in the Order appeared the most appropriate and only viable option on the evidence.

37. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"ERRORS IN FACTUAL FINDINGS

13. The Court erred in its factual findings by:

   13.1. Finding at paragraph 85 that the Respondent/Counter-Applicant engaged in "*large-scale and systematic diversion of funds*" of over R2.5 million (increasing to R3,165,409.95) when the figures were disputed and unqualified, and a forensic audit was needed to resolve this dispute;

   13.2. Characterising the Respondent/Counter-Applicant's conduct as a breach when the evidence showed that his actions were necessary operational responses to the Applicant's failure to properly maintain business operations;

   13.3. Relying at paragraph 129 on material from the Applicant's affidavit (including a WhatsApp message in which the Respondent/Counter-Applicant allegedly referred to the Applicant as his "universal wife") when this was a matter of disputed fact that could not be resolved on the papers;

   13.4. Not properly considering the Respondent/Counter-Applicant's version that the Applicant was never a partner but rather an employee, when this factual dispute is central to the pending action."

38. The applicant produced clear evidence as to the diversion of funds contrary to the Order.

39. That, and the various other breaches identified, were in plain non-compliance with the Order, as referred to above.

40. The reference to the WhatsApp is misconceived by the respondent: this was not to make a finding on the issue of a universal partnership, but to identify that there was evidence which was in favour of the applicant's version. That (1) the dispute as to the universal partnership and that (2) there were competing allegations in this regard, were identified, as opposed to ignored, and it was recorded that these were to be dealt with in the Action.

41. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

"MISDIRECTION ON COSTS

14. The Court erred in awarding costs on Scale C by:

14.1. Failing to properly consider that the application was substantially premised on disputed facts that could not properly be resolved on motion proceedings;

14.2. Not taking into account that the Respondent/Counter-Applicant had raised legitimate defences including the non-joinder point, the interpretation of the order, and the good faith defence;

14.3. Awarding punitive costs (Scale C) in circumstances where the Respondent/Counter-Applicant's opposition was not frivolous or vexatious but raised genuine legal issues that warrant consideration by a higher court."

42. The contempt application and the rescission application were for final relief. They were both determined in the applicant's favour. There was no reason why costs should not follow the result, and nor was any proffered.

43. The need for the variation of the 31 May Order arose because of the respondent's non-compliance therewith, as dealt with comprehensively in the Judgment. Awarding costs was considered appropriate by the court in the exercise of its discretion.

44. Scale C is not a punitive cost order but rather an award reflecting the court's consideration of aspects such as the complexity of the matter and the importance thereof to the parties.

45. The matter was complex, both factually and legally, and of importance to the parties, thereby, in the exercise of the court's discretion, meeting the criteria for an award on scale C.

46. In my view, these paragraphs do not ground a basis for leave to appeal to be granted.

47. The remaining content of the application for leave to appeal is general and conclusionary in nature and is covered by the aforegoing and will therefore not be considered further.

48. The application for leave to appeal therefore falls to be dismissed with costs. The consideration thereof was not as complex as the original matter itself and scale B shall apply, a view which was supported by both parties.

Order

49. In the premise, the following order is made:

1. The application for leave to appeal is dismissed with costs, with scale B applying.
2. The order of this court handed down on 1 December 2025 in the above matter is varied to include:
    - 2.1. A new paragraph 18 which reads as follows: "The application for rescission of the order of this court under the above case number on 31 May 2024 is dismissed."

2.2. A new paragraph 19 which reads as follows: “Save to the extent of the aspects in respect of which the relief sought therein was incorporated in the above paragraphs of this order, the counter-application is dismissed.”

A Kantor

Acting Judge of the High Court

APPEARANCES

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